MILITARY

LAW AUTHORITIES.

CHRONOLOGICAL EXPOSITION OF THE OPINIONS OF THE SEVERAL WRITERS ON MILITARY LAW.

PRECEDENTS, ALPHABETICALLY ARRANGED.

CHARGES, FOR CRIMES MILITARY AND NON-MILITARY, WITNESSES, EVIDENCE, ALPHABETICALLY ARRANGED.

FORMULA OF TRIALS BY REGIMENTAL, DISTRICT, APPEAL, AND GENERAL COURTS-MARTIAL, ALPHABETICALLY ARRANGED.

BY

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Booksellers to the East India Company.

1839.

CALCUTTA.
PRINTED AT THE BAPTIST MISSION PRESS.

TO HIS EXCELLENCY, GENERAL

THE HON'BLE SIR HENRY FANE, G. C. B.

&c. &c. &c.

COMMANDER IN CHIEF IN INDIA.

THIS WORK

IS,

WITH PERMISSION,

RESPECTFULLY DEDICATED

BY

THE AUTHOR.

TO HIS EXCELLENCY GENERAL,

THE HON'BLE SIR HENRY FANE, G. C. B.

&c. &c. &c.

COMMANDER IN CHIEF IN INDIA.

HON'BLE SIR,

I have the honor, with your Excellency's permission, to dedicate to you a work which embraces the opinions of the several writers on Military Law, on the various points which arise previous to, and during a trial by, court-martial.

2. My object, on the present occasion, is to trace the original authority for any opinion, and the length of time during which such opinion has been adopted. Where the writer gives the official opinion of the Judge Advocate General of the British Army, or of any legal authority, there is an undoubted weight due to it: while, where the writer does not bear an official character, though he may correctly quote the practice of his own time, there is less weight to be given to his opinion.

3. The Precedents quoted by me in Chapter II. of this little work, and in pages 217 to 273 of my last work, (1836,) contain points of practice, which appear to have been confirmed by the several Commanders-in-Chief in India, during the last 50 years, to which period the Records of the office of the J. A. G. of the Bengal Army extend; excepting such trials as may have been lodged in the office since

October, 1836, to which period my research has been made. Were a similar collection made in the offices of the J. A. G. of the Madras and Bombay armies, some other useful information would perhaps be obtained.

4. At some future period, were a Military Law Commission, composed of officers of the three presidencies, appointed to select and frame rules for the guidance of courts-martial, uniformity of practice would be introduced into the mode of conducting the judicial duties of the army. The Precedents selected, to be tested by the legal authorities in India.

5. It would be worth while to transmit the result of the labors of the proposed Military Law Commission to the authorities at home, with a view to the appointment of a Special Commission in England, composed of Military, Marine and Naval Officers, in conjunction with Counsel or Barristers of talent; and, finally, to be submitted to Parliament: with the view to the passing rules for the guidance of all courts-martial, &c., for the Royal army, the Marines and Navy, and the armies of the Honorable the East India Company.

6. In the year 1823, (G. O. C. C. 9th June,) the Comr.-in-Chief (Lt. Gl. Sir C. Colville), under the sanction of the Govt. of Bombay, published rules for the conduct of general courts-martial, which are now embodied in Section XX. of the Code of Military Regulations of the Bombay army. They are printed in Colonel V. Kennedy's last work (1832), at pages 285 to 305, in 86 articles. Many are very good, but do not embrace all the points required to be provided for; nor do they provide for the minor, or inferior courts-martial.

7. The Courts of Law at home and the Supreme Courts in India, &c., have regular rules for their conduct, and it would seem to be an anomaly that the army should not have their Code, while the first Mutiny Act and Articles of War, date from the year 1689! In July, 1833, (1) a Law Commission of five eminent barristers (2) was appointed in England, to digest into one statute all the enactments concerning crimes, their trial and punishment. Their first Report, in June, 1834, gives an opinion that "it would be expedient to reduce the written and *unwritten* (3) Criminal Law into one Digest," and states "the materials from which the Digest is to be made, viz., the decisions of the Courts dispersed through the printed and MS. Reports, and the different text writers of authority."

8. It continues by observing that—"of the text writers, many are referred to which are ancient, and not in general use even with the profession, and almost inaccessible to the public, &c., which become for the most part obsolete, from the changes made in the Law; while the works of modern text writers, though some are of good repute, must be very cautiously relied on as authentic evidence of the common law."

9. The following table will exhibit the dates at which the Military Law writers wrote.

(1) Edinburgh Review, No. 132, July, 1837, p. 214.

(2) Mr. Amos, President of the Indian Law Commission, was a member.

(3) "By the *unwritten law*, is meant the *principles* of the law as found by the Judges in the text books and Reports."—*Edinb. Rev., July, 1836, p.* 216. So that the practice of the Courts (Precedents) is to be made uniform—to render it certain, and to save the time of the Judges, and all concerned, &c.

Nos.	*First.*	*Last.*
1. Sullivan, ...	1781	1784
2. Delafons, ...	1805	1805
3. Adye (naval), ...	1783	1810
4. Mily. Law of England,	1810	1810
5. McArthur, Naval and Mily.	1792	1813
6. Tytler, James, ...	1799	1814
7. McNaghten, ...	1825	1828
8. Kennedy, ...	1824	1832
9. Simmons, ...	1830	1835
10. Hough, ...	1821	1836
Eleven volumes, (McArthur, 2 vols.)		

There are besides Bruce's Institutes, Williamson's arrangements, Symes, &c. quoted by the writers; whose works are scarce, if procurable. Sir C. Morgan, and C. Gould, (J. A. G. 50 years) are quoted by me.

My object, therefore, in my first chapter, has been to give the essence of the above eleven volumes; as no officer can have all the above works; and at the same time to show the various and discordant opinions, and to prevent officers quoting from memory, or from the old, instead of the new, editions; by which much discussion may be avoided; and, lastly, to prove the necessity of having one work only.

10. I do not presume to select any particular rule or mode of conducting the military judicial duties; but I have for 23 years labored hard to collect matter, so that out of the chaos, the good may be chosen; and that the minds of young officers, in particular, may not be perplexed by the various writers, I have proposed rules based on the opinions of Sir C. Morgan, Sir C. Gould, J. A. G., and others; but these rules are given merely to show how easily they may be framed.

11. I will instance a variance in the opinions of two Comrs.-in-Chief in India. In the case of Dr. Pears, (4) the Marquis of Hastings, decided that an

(4) G. O. C. C. June, 1817.

equality of votes was equivalent to an acquittal; in the case of Private Neale, H. M.'s 44th Foot, (5) Sir E. Paget, decided that the President should have a double, or casting, vote; and declared it to have been the custom in the army under His Grace the Duke of Wellington: Sir C. Morgan, J. A. G. stated that it was not the practice at the Horse Guards (6). The J. A. G. of 1817, was not in India in Aug. 1824.

12. It will afford me much satisfaction if my labors should, eventually, lead to the framing of a code, which shall be applicable to the service at large: and if this little book meets with the approbation of your Excellency, it will afford me high gratification.

I have the honor to be,
Hon'ble Sir,
Your obliged faithful servant,
W. HOUGH, *Major.*

(5) G. O. C. C. 23rd Aug. 1824.
(6) Notes to Tytler, (1814,) pages 135 and 311.

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Trial of Crimes, European N. C. O. and Soldiers, Queen's and Company's Troops, Bengal Army.

	1834.	1835.	1836.	1837.
Absent without leave,	1	8	1	...
Attempt to kill, or wound,	...	...	3	...
Burglary,	1	...	1	...
Desertion (I),	6	17	23	16
Disabling himself,	...	...	1	...
Drunkenness,	1	...	...	5
Insubordinate, and threatening conduct, &c.	3	4	...	4
Manslaughter,	1	...	1	3
Murder,	1	...	2	1
Mutinous conduct (D),	14	13	6	10
Mutiny (D),	13	8	3	3
Post, or guard, leaving or sleeping on,	4	5	3	3
Robbery,	6	4	...	3
Stabbing,	1	...	2	...
———, intent to murder,	...	...	...	1
Striking, N. C. O., on duty, &c. (D),	23	11	15	7
Theft,	4	4	3	...
Threat if evidence given,	...	...	...	1
Wounding,	...	2	2	2
Total,	79	76	66	59

(I) Increase in years 1836 and 1837.

(D) Decrease in ditto ditto.

N. B. But slight difference in the Native army, and among camp-followers.

TABLE, No. 2.

Officers, N. C. O. and Soldiers, &c. tried in years 1834 *to* 1837.

	Years.	Officers.		Staff Serjt. &c.	European Soldiers.	Native Soldiers.	Camp followers.	Totals.
		European.	Native					
	1834	16	7	3	83	22	9	140
	1835	16	3	1	88	9	1	118
	1836	9	6	...	66	7	2	90
	1837	8	4	...	59	5	1	77
Totals,...	4	49	20	4	296	43	13	425
Average,...	...	12	5	1	74	11	3	106

N. B. Including the Queen's, Honorable E. I. Company's Bengal Army, European and Native, &c.

TABLE, No. 3.

Punishments on European Soldiers.

	1834.	1835.	1836.	1837.
Hanged,	1	...	1	...
Transportation,	17	23	22	19
	40		41	
Imprisonment 2 years to 2 months,	58	61	29	31
	119		60	
Corporal punishment,	3	8	6	2

N. B. I would recommend that a trial should be made of sentencing soldiers to *serve on board of ship and made to work;* instead of being transported, or otherwise punished. It deserves the consideration of Parliament.

A

CHRONOLOGICAL EXPOSITION

OF

MILITARY LAW.

CHAPTER I.

COURT OF INQUIRY.

1. Courts of Inquiry are held for various objects, but, as observed by all the writers on Military Law, there is no specific enactment for holding such courts. They are held under a warrant, or an order issued. They usually consist of three officers(1). At a naval court of inquiry held at Spithead, in 1791, there were six officers(2). At the court of inquiry, held 14th November, 1808, to inquire into the "Armistice and Convention of Cintra," there were seven general officers(3).

2. As to whether the court shall be an open or closed one, must depend upon the nature of the inquiry. At the court held on the Cintra-Convention, on the third day, it is recorded that "the guard being withdrawn, strangers were allowed to enter." The two previous days were occupied by the court with closed doors. But at a special court held at Meerut, in 1815, the court was a closed court throughout

(1) Tytler, p. 399, the Warrant for one in 1757.
(2) Delafons, p. 53.
(3) See Proceedings published by Stockdale, London, 1809.

the proceedings(4). Colonel Kennedy(5) states "it is most usual in cases of complaints, to allow the court to be an open one, and to admit, at least, the complainant and party accused, with their friends."

3. Nor can there be any objection to allow the friends of both parties to be present; for, as the defendant may prove (since witnesses on both sides may be examined), that there is no ground for a trial; the presence of a friend may be useful, by inducing the accused to afford explanation.

4. In H. M.'s Service a court-martial is seldom ordered without a previous court of inquiry being held. I wish such was the practice in the Honorable Company's Service.

5. No military law writer objects to the accused being present, but several complain of the impropriety of examining the accused(6). The accused cannot refuse to attend if ordered, though he can decline to answer any questions(7).

6. Tytler in a note to his work(8) states that "a meeting of this kind, however, although they may collect material information, from apparent or known facts, or written evidence of which they may be possessed, are not authorised to examine witnesses, or record their declarations."

7. It is singular Tytler should have advanced such a doctrine, when he states (9) that "the power of appointing a court of inquiry is included in the right of assembling *General Courts Martial*; for the latter implying the right of judging whether such a measure may or may not be expedient, of course pre-supposes the former, as being the best means of regulating that judgment." The words of the warrant to the *J. A. G.* (10)—"and the said general officers

(4) To inquire into the conduct of some troops at Kalunga.

(5) Page 209.

(6) Delafons, p. 52. Military Law of England, p. 53. McArthur, i. 113. Tytler, p. 344.

(7) As remarked by H. M. in the case of Assistant Surgeon Walsh, G. O. H. G. 3rd July, 1809.

(8) Page 342.

(9) Page 341.

(10) Page 400, (in the year 1757.)

are hereby directed to cause you to summon such persons, (whether the Generals or other officers employed on the expedition, or others), as are necessary to give information touching the said matters, or as shall be desired by those who were employed on the expedition,"—prove that, if the crown, or any commanding officer, has the authority to order a court of inquiry, there exists the right to direct the examination of witnesses; both on the part of the prosecution and on the defence, if the accused desire it. The above warrant also directed "and to *report* a state thereof, as it shall appear to them, together with their *opinion* thereon."

8. In the case of the court of inquiry held in 1757, neither the witnesses nor the members of the court were ordered to be sworn; and in the case of the "Cintra-Convention," (1808) no such authority was given. So that there exists no precedent for swearing the president and members of the court, or the witnesses.

9. With regard to giving an *opinion*, it must depend upon the orders given to the court. In the cases quoted (1757 and 1808) an opinion was directed to be given; but those were cases of importance, which rendered it necessary, and perhaps in the case of 1757, as the general officer was afterwards tried by a general court-martial, it was proper to satisfy the public mind: but, in ordinary cases, the object is merely to satisfy the Commander-in-Chief, or other commanding officer, as to the propriety of a trial being held.

10. There is power also to revise the proceedings of a court of inquiry. In the "Cintra Case," the court gave it as their opinion that "on a consideration of all circumstances, as set forth in this *Report*, we most humbly submit our *opinion* that no further military proceeding is necessary on the subject. Because, howsoever some of us may differ in our sentiments respecting the fitness of the Convention in the relative situation of the two armies, it is our unanimous declaration, that unquestionable zeal and firmness appear throughout to have been exhibited by Lieutenant Generals Sir H. D.; Sir H. B.; and Sir A. W.; as well as that the ardour and gallantry of the rest of the officers and soldiers, on

each occasion during this expedition, have done honor to the troops, and reflected lustre on Your Majesty's arms.

"All which is most dutifully submitted."

(Signed) David Dundas, *Genl.*
Moira, *Genl.*
Peter Craig, *Genl.*
Heathfield, *Genl.*
Pembroke, *Lt. Genl.*
G. Nugent, *Lt. Genl.*
December 22nd, 1808. Oliver Nicolls, *Lt. Genl.*

Judge Advocate General's Office, 27th Dec. 1808 (11).

11. A letter from H. R. H. the Commander-in-Chief to the President directed the re-assembly of the court at the J. A. G.'s office, when the following questions were put.

Qn. Do you, or do you not approve of the *Armistice,* as concluded on the 22nd August 1808, in the relative situation of the two armies?

Approve.	*Disapprove.*
Lt. Genl. O. Nicolls.	Genl. Earl of Moira.
——— Sir G. Nugent.	
——— Earl of Pembroke.	
Genl. Lord Heathfield.	
—— P. Craig.	
—— D. Dundas.	

Qn. Do you, or do you not approve of the *Convention* as concluded on the 31st August 1808, in the relative situation of the two armies?

Approve.	*Disapprove.*
Lt. Genl. Sir G. Nugent.	Lt. Genl. O. Nicolls.
Genl. Lord Heathfield.	Genl. Earl of Pembroke.
—— Peter Craig.	—— Earl of Moira.
—— Sir D. Dundas.	

Such general officers who differed in opinion from the majority gave their opinion in writing, agreeably to instructions (12).

(11) Pp. 156, 157, printed proceedings.

(12) "You will be pleased, therefore, to desire such of the members as may be of a different opinion from the majority upon these two ques-

12. The proceedings were conducted by the J. A. G.; and in other cases of importance the J. A. G. or a D. J. A. G. is appointed to conduct and record the proceedings. The Crown, or the Commander-in-Chief, directs the investigation as to certain points, these are pointed out in the instructions which are read to the court; and the court are not at liberty, without proper authority, to inquire into other matters.

13. The three general officers concerned in the "Cintra-Convention" were present, and made statements. They were examined by the president, and members (13); and they examined each other (14); and naval and military officers were examined as witnesses (15). Questions, in writing, were given to some of the witnesses (16).

14. The proceedings of the above court were adjourned to await the arrival of Lt. Genl. Sir H. B. So that we may observe that no officer should ever be prevented attending to justify his conduct (17).

15. The above court also met in closed court, without the attendance of any of the other Generals, whose conduct was the subject of inquiry (18).

16. The above court of inquiry gives the best precedent that can be produced regarding a similar subject. Where the subject for investigation is a *petition* from a soldier, containing several points of complaint, it is best to adopt the following course,—to take evidence on each point, and having done so, to give an opinion (when called for) as follows:— "There is no evidence that *Somerville* was *picked* out; on the contrary, it appears that he went to the riding school as

tions, to record upon the face of the proceedings their reasons for such dissent."

(13) Pp. 63, 125, printed proceedings.

(14) Pp. 103, 123, 136, ditto.

(15) Pp. 65, 98, ditto.

(16) P. 98, ditto.

(17) As remarked by a member—" It is best to postpone any examination which could, even by implication, affect Sir H. B." P. 108, ditto.

(18) P. 109, ditto.

a matter of course, with the *other recruits* to take a lesson:" (19), and so on.

17. The members of a court of inquiry (20) have become the prosecutors of a witness, before their court, whose conduct had been so reprehensible and culpable as to induce the Admiralty to order his trial, "all the officers who were members of the court of inquiry attended at the court martial as prosecutors for the crown." "However, the prosecution was conducted by one of the members."

18. Major General Sir C. Dalbiac, President of the court of inquiry, 16th November 1831, was the prosecutor on the subsequent trial of the late Lieut. Col. Brereton and Capt. Warrington, regarding their conduct in the Bristol riots. The above court of inquiry sat with closed doors. So that the officers of such courts, particularly the President, have important duties to perform, and are liable to be either prosecutors, or to be examined as witnesses; therefore in important cases, they should take notes, and pay attention to the manner in which the witnesses give their evidence, and how far there may be reason to suppose that they may give evidence with a degree of confidence, their relations not

(19) Petition of Private Richard Somerville, Scotch Greys. *Analysis* of various papers containing the charges against Major Wyndham, article by article; with the decision of the court. *Opinion.*—"And on the whole, the court is of opinion that, &c. there is no evidence that he (Major W.) acted with any views, or from any motives, unbecoming his station and character, or in any such manner as could subject his honor as an officer to just impeachment."

(Signed) T. Bradford, *Lt. Genl. and Presdt.*
J. Nicolls, *M. G.*
A. Campbell, *M. G.*
Geo. Burrell, *Col.*
Robt. Grant, *J. A. G.* J. Townsend, *Lt. Col.* 14*th L. D.*

The above case was published in G. O. to the army in August 1832. (See my work, 1834, p. 141. *Court of Inquiry.*)

It will be seen that in this case and in that of "Cintra," the general, &c. officers of the court signed according to *seniority* where there was no difference of opinion. Where there was a *dissent* from the opinion of the majority, then the junior first recorded his opinion.

(20) Naval Court of Inquiry at Spithead, in 1791. Delafons, p. 53-4.

being on oath, or how far they may keep back their evidence.

19. Witnesses examined before these courts should always be cautioned that they may hereafter be called upon to depose, on oath, to the evidence they are to give (21). This caution is particularly necessary with *native* witnesses. And it may be remarked, that, in the case of European soldiers there is at times a dislike to give evidence against a comrade before such courts ; while the being sworn to tell the truth forces them to tell all they know.

20. It is usual either to submit charges before the court, or a statement in writing, or some correspondence between the parties concerned, and to call for an opinion, or not, as the commanding officer may think proper. In regimental courts of inquiry it is not usual to call for an opinion, unless the matter submitted relates to pecuniary affairs, or the like. With regard to military crimes, it must be obvious, that a commanding officer cannot, consistently, leave it to be decided by his juniors, whether a trial is necessary to support the discipline of his regiment.

21. It is, therefore, in the case of officers rather that an opinion is called for, and then as to whether there are grounds for putting the officer on his trial. Such opinion, however, is not binding on the Commander-in-Chief, or other authority.

22. A court of inquiry may be held after any lapse of time (22) ; in this view, therefore, half-pay officers who are said not to be amenable to trial by court-martial for acts committed while on half-pay (23),—though they have been tried (24),—and military crimes which "shall appear to have been committed more than three years before the issuing of the commission or warrant for such trial" (25), may become

(21) G. O. C. C. (Bengal) 8th Feb. 1802.
(22) Sir C. Morgan's note, Tytler, pp. 160, 161.
(23) Tytler, p. 112.
(24) Simmons, p. 11.
(25) M. A. clause 20. In the Hon'ble Company's Army five years, Section LXXI. 4 Geo. 4 c. 81.

the subject of investigation; for while there exists the power in the Crown to dispense with the services of officers without trial, such is never done without some inquiry; and as, in military cases it might be impracticable to hold a court-martial, it is right that there should be some court before which an inquiry could be instituted.

23. It is not the practice to place an officer in arrest before the result of the court of inquiry is known, and it is settled that a trial is to take place, on a reference to the Commander-in-Chief; unless some highly improper conduct occurs to render the measure necessary.

24. As there is no positive enactment to regulate the conduct of courts of inquiry, and as the writers on military law only give general opinions, I propose to state what appear to be the correct rules for their guidance; drawn from the cases above quoted.

General Rules.

1. That they be assembled after any lapse of time; since the 20th section of the mutiny act only, specifically, gives a limit to the holding courts-martial.

2. That they may consist of any number of officers, and of any rank, of 3, 5, 6, 7, &c.

3. That the accused and the accuser are both present (26).

4. That neither the President, Members, or Witnesses are sworn, simply because there is no authority to administer an oath given in the mutiny act; or in any of the warrants for holding them (27).

5. That either charges are submitted to the court, or a statement, or documents, which are to be investigated.

6. That instructions are laid before the court for their guidance, and the court are not to deviate from them.

(26) I mean military cases.

(27) The 91st article of War only states that "all persons who give evidence before any *court-martial* are to be examined upon *oath.*"

7. That the evidence is recorded in writing, and the same rules are observed as in conducting the proceedings of a court-martial; but without the precise and strict form of a court-martial.

8. Original documents are copied, but are retained; as they may be required to be produced at the ensuing court-martial.

9. The evidence for the prosecution being concluded, the accused is usually called on to make a statement, and if he likes, to examine witnesses: but he cannot be compelled to answer any questions.

10. The attendance of the accused, if ordered, is a matter of course: as his not attending would be a disobedience of orders.

11. The witnesses should be cautioned to be correct in their evidence; as they may be afterwards examined on oath. (*See Note* 21).

12. That military witnesses ordered to attend, cannot refuse to come to the court; as it would be a disobedience of orders.

13. That the accused cannot demand a copy of the documents recorded on the proceedings; which are only, in this stage, intended for the information of the authority ordering the court, or Commander-in-Chief.

14. There is no legal authority for demanding a copy of the proceedings, though there may be no trial held, or that the officer, &c. shall have been dismissed the service, as the result or opinion of such an investigation (28). The 17th clause of the mutiny act declares, "and any person tried by a *general* court-martial, or any person in his behalf, shall be entitled, on demand, to a copy of *such* sentence and proceedings, &c." A court of inquiry is not named.

15. With regard to witnesses in a *civil* capacity, not under the orders of Government, there appears no means to compel their attendance, the attachment laid down in clause

(28) Home *v.* Lord F. Bentinck, Exchequer Chamber, 17th June, 1820.

(15) of the mutiny act, only extends to witnesses before general, district, or garrison courts-martial.

16. The Judge Advocate General, or a D. J. A. G. conducts courts of inquiry in important cases, or any staff officer;—a commanding officer, or other military officer, or person, may conduct the proceedings,—his name should be stated in orders, or in the instructions.

17. The hours of sitting are not limited; the article of war 92, declares that "no proceedings or *trials* shall be carried on except between the hours of —— and —— and relate to courts-*martial* only" (29).

18. Contempts before courts of inquiry are as much punishable as before courts-martial. There seems to be no doubt but that officers may be placed in arrest, or soldiers in confinement, by order of the court.

19. The proceedings may be revised more than once; the clause of the mutiny act 16, only relates to courts-martial (30).

20. The accused officer before a court of inquiry is not usually under an arrest, unless there exists any necessity for the measure. With regard to soldiers, they are usually confined for some violence committed, which occasions their being brought before the court. See *Arrest.*

21. Courts of inquiry are usually laid before the court-martial (*see Rule* 11), in order that it may be seen whether there be any material deviation in the evidence given before the two courts.

22. There is an interpreter appointed if required.

23. If ordered, an opinion is given, in general terms, whether there are, or are not, grounds for trial by a court-martial.

24. The President and members all sign according to seniority. But if, as in the "*Cintra Case,*" the court are

(29) The preceding article 91, relates to courts-martial, and the words in article 92, "except in cases which require an immediate *example,*" clearly prove the above construction.

(30) "No finding, opinion, or sentence given by any *court-martial,* &c. shall be liable to be revised more than *once.*"

called upon to give a detailed opinion of their reasons for dissenting from the majority ; then the junior member signs first (31).

25. If the J. A. G. or a D. J. A. G. or any other officer be ordered to conduct the proceedings, he, under his instructions, should exercise his judgment. The court if asked to give an opinion, give such an opinion as the matter before them shall appear to warrant (32).

26. The court is an open, or closed court, as may be ordered.

Arrest.

1. The article of war 107 declares that " no officer or soldier, who shall be put in arrest or confinement, shall continue in his confinement more than eight days, or until such time as a court martial can be *conveniently* (33) assembled."

(31) Article 94 (*courts-martial*), " and in taking the votes of the court, the President shall *begin* by that of the *youngest* member."

(32) The words of the Warrant in 1757, to inquire into the cause of the failure of an expedition to the coast of France, are as follows: " And the said general officers (Duke of Marlborough, Lieut. General, Lord G. Sackville and John Waldegrave, Major Generals) are hereby directed to cause you (J. A. G. or his deputy) to summon such persons, (whether the generals or other officers employed on the expedition, or others,) as are necessary to give information touching the said matters, or as shall be desired by those who were employed on the expedition. And the said general officers are hereby further directed to hear such persons as shall give them information touching the same ; and they are authorised, empowered, and required, strictly to examine into the matters before mentioned, and to *report* a state thereof, as it shall appear to them, together with their *opinion* thereon. All which you are to transmit to our Secretary at war, to be by him laid before us, for our consideration ; and for so doing, this shall be, as well to you, as to our said general officers, and all others concerned, a sufficient warrant."

" Given at our court, &c."

(Signed) Barrington.

To our trusty and well beloved T. Morgan, Esq., J. A. G. of our Forces, or his deputy.—Tytler, p. 400.

(33) By the Circular, No. 759, War Office, 31st October, 1833, whether soldiers be found guilty of military offences, or of *civil* offences, the forfeiture of pay takes place from the day of confinement, or com-

2. The article of war 59 declares that "who shall unnecessarily detain any prisoner in confinement, without bringing him to trial," shall (art. 69) if an officer "be liable to be cashiered," and if a N. C. O. "shall be punished according to the nature and degree of his offence."

3. The nature and degree of the arrest should be explained in writing, whether it be arrest at large or close arrest; if the latter that "he is strictly and invariably to consider himself confined to his quarters or tent, or other place of residence, until regular application be made to the commanding officer for the liberty or range of the garrison, cantonment, or camp, by whom it will be in most cases granted, or when necessary, be referred to the Commander-in-chief" (34).

4. If the officer be allowed the liberty of the cantonment, &c. he is not allowed to "dine at his own or any other military mess (35); nor appear in any place of public amusement"(36). The nature and degree of the arrest should always be in writing to prevent any misconception.

5. "An officer who may be placed in arrest has no right to demand a court-martial upon himself, or to persist in considering himself under the restraint of such arrest, after he shall have been released by proper authority, or to refuse to return to the exercise of his duty. It by no means follows that an officer conceiving himself to have been wrongfully put in arrest, or otherwise aggrieved, is without remedy; a

mitment, as whilst in confinement the soldier has no pay, &c. to forfeit. The punishment is calculated from the date of the sentence, so that if confined on the 1st, tried on the 10th, and sentenced on the 11th to six months imprisonment, they count the 12th the first day of his sentence; though he would lose pay and service from the 1st of the month.

(34) G. O. C. C. (Bengal) 29th June, 1805. The Commander-in-chief remarked that "the conduct of the subaltern officers in general in the garrison during Lt. H.'s arrest, appears to have been influenced by a spirit of contumacy and defiance of authority, in the marked manner of associating with that officer while under arrest."

(35) See G. O. H. G. 1st September, 1808. Remarks by court—"the court is concerned to notice the conduct of Lt.-Col. N., the prosecutor, in having continued to associate with Lts. S. and S. and to permit them to dine at the mess, whilst so under arrest."—*James's Decisions*, p. 289.

(36) Simmons, p. 120.

complaint is afterwards open to him if preferred in a proper manner, for which provision is made by an article of war"(37).

Confinement of a Soldier.

Sergeants are usually placed in arrest; unless for some crime requiring close confinement, when all distinction ceases. Soldiers are confined to the regimental barrack guard till they are tried. If violent, or the crime be of magnitude, they may have irons put on them, when they are put into one of the cells.

Jurisdiction.

i. *Limitation as to time.* Clause 20, mutiny act, declares that "no person shall be liable to be tried and punished for any offence against any of the said acts or articles of war, which shall appear to have been committed more than three years before the issuing of the commission or warrant for such trial, unless the person accused, by reason of his having absented himself, or of some other manifest impediment, shall not have been amenable to justice within that period, in which case such person shall be liable to be tried at any time not exceeding two years after the impediment shall have ceased"(38).

2. Lieut. Colonel Johnston (39) 102nd regiment, was ordered to be tried for mutiny committed at Sydney, N. S. Wales, on or about the 26th January, 1808; the warrant was

(37) Regns. and Orders for the army 1837, p. 244. This is the old order of 1st Feb. 1804, omitting the words, "neither can an officer insist upon a trial, *unless a charge is preferred against him.*" (See my 1st work, 1821, p. 462), so that an officer cannot demand a court-martial on himself.

(38) The company's M. A. Sect. lxxi. declares "or unless the conduct of the person accused shall have been submitted to the Court of Directors, in which case such person shall be liable to be tried at any time not exceeding five years after his offence shall have been committed."

(39) G. O. H. G. 2nd July, 1811.

dated the 3rd April, 1811. It was objected by some of the members of the court, that the charge was for an act done more than three years before the issuing of the warrant. It appeared that Capt. Bligh, the prosecutor, did not arrive in England till the 25th October, 1810, and that Lt.-Col. J. was in the colony in March, 1809. The J. A. G. observed that " there must be in all trials two parties; if one party is absent, it is as impossible to go on with the prosecution as if both were absent: and the clause referred to in the act of parliament states a limitation of time, unless some manifest impediment arises to prevent the prosecution being brought forward within that period of time; then it gives two years more after that impediment is removed; and the court will see that those two years cannot be expired, as far as the prosecutor is concerned, because he only arrived in England on the 25th of October, 1810" (40).

ii. *Suspended officer.* 1. Sullivan (41) says, that " an officer under suspension, may be considered as *strictly amenable* to martial law for any trespass or transgression he shall commit."

2. Tytler (42) states that " the suspended officer remains therefore, subject to the military law, and is punishable for every breach thereof committed during his suspension."

3. Capt. McNaghten (43) states " there are indeed but few breaches of the mutiny act which a suspended officer could find an opportunity of committing; but for an offence against those which are within his reach, I confess my

(40) Printed trial, pp. 3 to 17. The court sat on the 7th May, 1811, but had the warrant been dated on the 24th October, 1812, the trial would have been legal. So that where there is any impediment, if the offence was committed more than three years before the warrant or order is issued, without specifying what number of years, the trial would be legal; but the impediment having ceased, the limit of two years is fixed, within which the trial must take place. But this refers to military crimes within the mutiny act and articles of war, and would not affect a trial for murder, &c.

(41) Page 89.

(42) Page 126.

(43) Page 26.

doubts as to the competency of a general court-martial to try him. In a flagrant case, such as one involving scandalous and infamous conduct, the best way would be for the king or the company to dismiss him summarily"(44).

4. Not only are Sullivan and Tytler against Capt. McNaghten (and Sir C. Morgan J. A. G. made no objection to Tytler's opinion, and Tytler himself was a lawyer and a D. J. A. G.) but the practice of the service appears clearly to favor the position, that "suspended officers" are amenable: thus,—"Capt. Pringle O'Hanlon, 1st regiment, light cavalry, *(now under suspension)* was arraigned on the following charge"(45).

iii. *Crimes triable by superior, when cognizable by an inferior court martial.* Under the article of war 85 "whereas it may be advisable that some of the foregoing offences, which in certain cases may admit of less serious notice, should be tried by *District, Garrison, or Regimental* courts-martial, in such cases the officer Comg. the battalion, corps, or detachment, who may deem it advisable so to proceed, shall lay a statement of the case, together with the charge he intends to bring, before the general or other officer Comg. the brigade, district, or garrison, with an application so to proceed" (46).

iv. *Non-military crimes.* Under section ii. 4 Geo. iv. C. 81. The crimes of murder, theft, robbery, rape, &c. are

(44) As to the competency, it here refers to the right to *insist* on his trial. But as the Crown, &c. may dispense with the officer's service without trial, surely it would be in his favor to *allow* of a trial! Lord G. Sackville (1760) though "deprived of all military employ or command under H. M.; yet, having entreated a public investigation of his conduct by court-martial, was *allowed* that *benefit;* which it is manifest could not have been granted to him, unless he had been considered as strictly amenable to martial law." (*Tytler*, p. 27.)

(45) G. O. C. C. (Bengal) 23rd October, 1835, and 31st Dec. 1835.

(46) "The striking or kicking a serjeant, quitting post," are to be tried by a *general* court-martial, "drunkenness on duty under arms, drunk when sentry on duty, or piquet" (except perhaps on the line of march) are to be tried by a *district* court-martial. (G. O. H. G. 13th May, 1833.)

triable by general courts-martial, if committed at places (other than the Prince of Wales's Island) within the territories of any foreign state, or in any country under the protection of H. M. or the said (united) company, or situated *above* 120 miles from the said presidencies (Ft. Wm., Ft. St. George, and Bombay), so that at places at, or within 120 miles, the jurisdiction belongs to the supreme courts of judicature.

2. Colonel Kennedy (47) states "in the East Indies, however, the counterfeiting the coin there current has been made felony by the 73rd section of the 9th Geo. iv. cap. 74 (*for the administration of criminal justice in the East Indies*). But as this statute is merely a *local* law, it does not render it *competent* for a *general* court-martial, exercising criminal jurisdiction by virtue of the 102nd article of war, or of the 2nd section of the 4th Geo. iv. cap. 81, to take cognizance of this offence; and consequently, should a soldier be accused of counterfeiting or falsifying the coin current in the East Indies, he *must* be delivered over to the *civil* power, if it be thought necessary to bring him to trial"(48).

(47) Page 271.

(48) The section ii. 4. Geo. 4. c. 81, does not mention the crime relating to *coin*. The 102nd article of war uses the words, "*coining*, or clipping the coin of this realm or any *foreign* coin current in the place where such officer or soldier shall be serving." The word "*counterfeiting*" is used in section lxxiii. of 9 Geo. iv. c. 74. So that the Colonel declares that no officer or soldier is amenable to the Indian act, and, it would seem, because section ii. 4 Geo. iv. c. 81, and article of war 102, declare the punishment shall be, as regards all crimes (murder, &c.) "*in conformity to the common and statute law of England.*"

Either the Colonel, or the legal authorities at Bombay, appear to me to be mistaken in their law. The section ii. 4 Geo. iv. c. 81, was passed before the criminal act in question; the former was enacted on the 18th July, 1823, the latter on 25th July, 1828, so that when the former was published the law of England was in force. The 102nd article of war (1837) declares that "any officer or soldier who may be serving in our garrison of *Gibraltar*, or in any of the territories of the *East India* Company, at a distance of 120 miles, &c. shall be tried by a general court-martial." So that the article was not framed solely for the East Indies. The section ii. 4 Geo. iv. c. 81, applies to His M.'s and the Company's troops, "having the command of a body of troops of H. M. or of the said

3. The limitation as to time does not affect non-military offences, for Gov. Wall was tried at the old Bailey, on the 20th January, 1802, for a *murder* committed at Goree, on the 10th of July, 1782, convicted, and executed (49).

v. *If tried before.* Clause 16 of the mutiny act declares that "no officer or soldier, being acquitted or convicted of any offence, shall be liable to be tried a *second* time by the same or any other court-martial for the same offence, unless in the case of an appeal from a regimental to a general court-martial."

2. The not being tried a *second* time, implies that there had been a legal trial before; for if a court-martial should by deaths, be reduced below the legal number of officers to compose it, a new trial would take place in the same manner as obtains in the criminal courts in England, &c.; where if a juror die, &c. a new jury and fresh trial may take place (50). *See* vi.

Company." Now, the Article of War 143, declares that H. M.'s land forces in the *East Indies*, are to be subject to the Rules and Articles of War established for the service of the E. I. Company if "not at variance with the Rules and Articles of War for the government of all our forces."

The section in question (ii. of 4 Geo. iv. c. 81), is part of an Act of Parliament, and I am of opinion, that while it gives *general* courts-martial power, under certain limitations, to try for the crimes of murder, &c. whether the officer or soldier, &c. belong to H. M.'s or to the Company's service, still that the 9 *Geo. iv. c.* 74 (the Criminal Act for *India*) is the guide for the *military* courts; the contrary construction would lead to this conclusion, that, if tried by the *military* court the officer or soldier would be punished by the law of *England;* and if tried (within 120 miles, &c.) by the supreme court according to the law of *India.*

If we by the Mutiny act (sect. ii. 4 Geo. iv. c. 81), are empowered to try an officer or soldier for murder, &c. under a given limitation as to distance from Calcutta, &c. and thus to hold a court of the same powers as the supreme court, sitting in their place as judges, so do we partake of the laws by which such court is governed; that is when the supreme court received the *Indian act* for their guidance, they parted with the law of *England;* and hence the 9 Geo. iv. c. 74 became the act for the army; while the Mutiny Act (sect. ii. 4 Geo. iv. c. 81), giving jurisdiction to the military courts, contains the first authority.

(49) State Trials, vol. 28, p. 51.

(50) Trial of *James Gallagher and Hugh O'Neill,* Lancaster assizes,

vi. *Illegally constituted court.* If there should be officers of a rank below that laid down in the articles of war; or if there should not be the number of officers prescribed, such would render the court-martial illegally formed; and its acts would be null and void. And so, if the President were to die, though there were the legal number of members without him, the court would proceed with the trial afresh with a new President, who might be one of its members (51).

vii. *As to whether the person to be tried is amenable.* It must also be ascertained whether the person to be tried is amenable to trial, according to the clauses of the mutiny act, or articles of war; and though persons may not generally be subject to *military*, they may be to *martial* law, whenever a proclamation shall be issued. So that non-military crimes, even, would then be triable, and the military courts would have jurisdiction over all crimes, and over all persons.

viii. *Half Pay Officers.* Half pay officers are said not to be amenable for any crime committed while on half pay (52)—though they have been tried (53). But if an officer holds a brevet or army commission, superior to his regimental one, he is amenable (54); and it is not unusual, for H. M.'s officers on the general staff (as Adjt. General, &c.) in the *East Indies*, &c. to have only the half pay of their regi-

4th September, 1824, (Saturday.) A juror fell down in a fit in the jury box; a surgeon declared he would not for some time be able to resume his duty. The jury was discharged, and a fresh jury ordered to be summoned, and Mr. Justice Bayley said he would try the indictment again on Monday. (See my work, (1825) p. 666, note 61.)

(51) One or more of the senior members should be named in the Warrant, or provided for by the mutiny act. In all commissions of assize, there are along with the (2) judges, one or more King's counsel, &c. named, who, if a judge die, &c. take his place.

(52) Tytler, p. 112—See *Court Inquiry*, note 23.

(53) Lieut. James Blake's case, G. O. H. G. 6th July, 1805, "who acknowledged himself subject to martial law." Simmons, pp. 11, 12, 13.

(54) Sir H. Taylor's evidence, *Bradby* v. *Arthur*, K. B. 30th July, 1824, (my second work, (1815) p. 4.)

mental rank; unless their regiment shall be in India, when they receive *full* pay.

ix. *Listed or in pay.* As observed by Capt. Simmons (55) the words "listed or *in pay* as a N. C. O. or soldier," clearly comprehend masters of bands, serjeant school-masters, serjeant armourers, drummers and others; who, though not "inlisted or attested, are in the receipt of pay as N. C. O. and soldiers."

x. *Peers subject to military law.* As observed by Captain Simmons (56) "the words of the mutiny act, now and for many years in force, 'any person commissioned, or in pay as an officer,' must necessarily embrace all *Peers* and members of parliament, who may be commissioned or in pay. In March, 1749, an ineffectual attempt was made, in the House of Lords, to exempt peers from trials by courts-martial" (57).

Charges.

1. According to article of war, 108, an officer or N. C. O. when committing any prisoner, is directed "to deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged;" which is for the information of the officer Comg. the regiment or station. If a N. C. O. or soldier is absent from barracks, and commits any crime during his absence, or while in barracks, a crime is made out and submitted to the Comg. officer, which should properly be inquired into by him at the orderly room next morning; or before, if the case shall require an immediate investigation, but never should be until the prisoner is sober; but no soldier, once confined, though he may have been more than eight days in confinement can be released by the

(55) Page 14, and serjeant Grant's case (1792) in *pay* as a serjeant of 74th regiment though not *inlisted*. See *Samuel*, (1816) pp. 339 to 345, and Grant v. Sir C. Gould (J. A. G.) H. Blackstone's reports.

(56) Page 17.

(57) If a peer were to commit *murder*, I presume he would be tried by his peers; the amenability to trial, by court-martial, for *military* offences is proper, and necessary.

officer on guard without authority, if even no crime has been lodged: the article of war, 107, adds "or until such time as a court-martial can be conveniently assembled." The charge above recited, is submitted to the officer Comg. the regiment by the adjutant; (the orderly serjeant reports to the serjeant-major, and he to the adjutant.) The Comg. officer either awards some punishment, if a trial be not necessary; or he orders a court of inquiry to be held, and the charge, or another charge, is laid before the court. If the crime be cognizable by his authority, he orders a regimental court-martial; or under the article of war, 85, lays "a statement (the court of inquiry) of the case, together with the charge he intends to bring before the general or other officer Comg. the brigade, district, or garrison, with an application to try the soldier by *district*, *garrison*, or *regimental* court-martial (if compatible with circular G. O. H. G. 13th May, 1833); or applies for a general court-martial.

2. With regard to H. M.'s N. C. O. and soldiers, the circular letter No. 5839, dated 12th October, 1833, from the adjutant general H. M.'s forces in India, regarding general courts-martial, directs that "in these cases, the charges are to be framed by the D. J. A. G. of the division; and H. E. desires you will immediately direct the assembly of a general court-martial for the trial of the prisoners, without reference to head-quarters; only reporting the circumstances, with a copy of the charge, for H. E.'s information."

3. *Revised charges.* It was declared by Sir C. Morgan, when J. A. G. (58), "It is not to be supposed, that a charge, drawn up by those who may prefer it, is to go of course, in that state to trial; but it may be framed and altered in such way, as the officer who is to order the trial may think best, both in regard to substance, as in other respects." In the case of Lieut. Genl. Whitelocke (59) the J. A. G. observed, "it is perfectly understood, that till the king's warrant is signed, there is the power in the crown, or in the party who brings forward the prosecution, to alter those charges."

(58) Note to Tytler, p. 205. (59) Printed trial, p. 797.

4. In the above warrant is usually contained the charge, but as the warrant is the order for the trial, that warrant or order may be cancelled; so that in point of fact, the expression should be that charges cannot be altered after the *arraignment*, or that the prisoner has *pleaded* to them. This is the view taken by Captain Simmons (60) who states that "the officer ordering the court-martial may alter or amend it at any time, *antecedent to arraignment;* except that where the charges are embodied in the warrant for holding the court-martial, which sometimes happens when it issues under the sign manual; they cannot be altered after the warrant is signed. The warrant may however be revoked previous to the arraignment, and a fresh one issue with amended charges." If the defect were as to form or substance, the revocation would be the only mode to be adopted: if additional matter came to light, additional charges would be the plan. But the warrants above alluded to are chiefly confined to the trials of officers of high rank, and in India and out of Great Britain, are never used.

5. *Form in case of Soldiers.* By the regulations and orders for the army, 1837 (61), "In framing charges, the utmost care is to be taken to render them specific, in names, dates, and places; and in charges against N. C. O. or soldiers, the prisoner's regimental number should be invariably inserted (62). All charges preferred against an officer or soldier, and the circumstances on which the charges are founded, are to be previously examined by superior authority, in order to its being ascertained that they are such as should be submitted to the cognizance of a court-martial."

(60) Page 146.

(61) Page 245.

(62) The numbering of the men was first ordered in 1831, I think, when a registry of the services of soldiers was ordered. They are numbered from one to —— throughout the regiment, so that if there be two men of the same name, they can be identified by the numbers. In the Madras and Bombay armies, the native soldiers are numbered A, B, C, &c. company, Nos. 1, 2, 3, &c. per troop, or company. In Bengal, even the European troops are not numbered. It is to be hoped that a numbering will be ordered for the Bengal army generally.

In the Bengal army it is directed (63) that " in drawing up the charges, accuracy and precision are indispensable. All charges ought to be drawn out in so full and clear a manner as to leave no room for doubt or misconception, and it is the duty of the judge advocate to remonstrate against the court's proceeding to trial on a charge that is deficient in accuracy or perspicuity." " Charges should be simple, divested of the intricacies of civil law. The facts to be stated in plain terms, and without technical formalities" (64).

6. *Divested of technicalities.* " The J. A. to take care to frame charges for non-military offences with precision and conciseness" (65) and " the technical strictness used in an indictment is not necessary in the framing of charges for *military* offences ; still it is obviously objectionable to charge a prisoner with stealing, *or* having in his possession knowing it to have been stolen ; to charge a *second* with instigating to, *or* conniving at ; and a *third* with conniving at, *or* not taking due precautions to prevent the commission of an offence, and to find all the prisoners guilty, without declaring whether the *first* was a thief *or* receiver ; whether the *second* originated or only connived ; and whether the *third* was guilty of conniving or only of negligence. Such faults ought to be avoided ; by stating the allegations in *separate* charges or instances of a charge ; and even if committed in charges, they ought not to be repeated, but remedied, in the *finding*" (66), nor " should charges imitate the minutiæ of the civil courts, details quite unnecessary before military courts ; there should be no disgusting expressions of a drunken or mutinous soldier (either in Hindoostanee or English) ' unsoldier-like conduct,' or ' insubordinate,' or ' improper language,' being quite sufficient" (67).

(63) G. O. C. C. 8th February, 1802, (Lord Lake.)
(64) G. O. C. C. 25th November, 1826.
(65) Lr. O. J. A. G. No. 284, 6th June, 1835.
(66) Circular J. A. G. O. No. 303, 25th November, 1836. See also *Chitty* Crim. Law, 236. *Kennedy*, 44, 59.
(67) G. O. C. C. 26th October, 1835, by the Commander-in-Chief in *India*, requesting conformity at *Madras* and *Bombay*.

7. *Detail by figures as to dates or numbers.* It is stated "that no part of an indictment must be in *figures;* and therefore *numbers, dates,* &c. must be stated in *words* at length. The only exception to this is, where a *facsimile* of a written instrument is to be set out, as in the case of forgery; in which case it must be set out in the indictment in *words* and *figures,* as in the original itself" (68). But in military charges framed under the Bengal Presidency, it has of late been usual to insert in charges, as to dates, sums of money both in writing and in figures, particularly in cases of embezzlement, or crimes of a non-military nature: there is an objection, in such cases, to the use of figures alone, as a figure might be erased: the use of figures as an addition, is to see the amount more readily.

8. *Forms of charges for military, and non-military crimes.* I propose to give in the next chapter, a form for charges for all crimes, whether of a military, or non-military nature; where they will be found *alphabetically* arranged.

Copy of Charges to Prisoner.

1. All the writers on military law state, that it is usual to furnish the prisoner with a copy of the charges upon which he is to be tried (1). In the case of private Leonard, H. C. European regiment (2) who appealed from a regimental to a general court-martial, the court sustained the appeal, "It having been clearly proved, that though the appellant was confined on the 11th and not brought to trial before the 15th July, 1817, he was not furnished with a *copy* of the crime (3), and on other grounds; and another Commander-in-

(68) Archbold's Crim. Plead. 25.

(1) Sullivan, 13. Adye, 112. Mily. Law of England, 99. McArthur, i. 280. Tytler, 217, 358. Kennedy, 50. Simmons, 128; and McNaghten, may be included.

(2) Hough's Prac. Courts-martial, 1825, p. 249, G. O. C. C. 1817, *(Hastings.)*

(3) The serjeant-major read the crime to the prisoner when he was brought to the quarters where the court was held. There were *native* witnesses and no interpreter, and *time* and *place* were omitted in the charge.

Chief (Lord Combermere) stated that "a copy of the charge should be given to the prisoner as early as possible, as well as a list of witnesses for the prosecution in all practicable cases" (4). And the same Commander-in-Chief was of opinion (5) that "the substance of the accusation, before charges are finally framed, should be communicated to him."

2. *Rule in the Navy.* By the printed instructions (1806) under the head of "courts-martial," the President is to take care that a copy of the charge or complaint be delivered to the person accused as soon as may be, after he shall have received the order to hold such court-martial, and not less than 24 hours before the trial" (6).

3. *As to the legal right.* In the Bombay code of military regulations, "courts-martial," section xx. art. 16, (7), "A prisoner cannot plead in bar of trial, that he has not been furnished with a copy of the charges, or that the copy furnished him differs from those on which he has been arraigned. Because though it is *customary* to furnish him with a correct copy, it is not legally necessary:" "such circumstances" *Kennedy* remarks (8) "can be only urged by him as sufficient grounds for requesting from the court a longer time for the preparation of his defence." And *Simmons* (9) observes, "yet the court, under such circumstances, and particularly where the deviation may be material, would probably deem it a sufficient cause for delaying proceedings; as common sense and reason would dictate that the accused should have a knowledge of the accusations brought against him previous to trial; and adequate time afforded

(4) G. O. C. C. 23rd September, 1826.

(5) G. O. C. C. 11th April, 1827. This was the case of a field officer tried on charges relating to various subjects. The charges against a soldier for mutinous, insubordinate, &c. conduct, are of a different nature; the prisoner has heard the evidence against him, generally, before a recent court of inquiry.

(6) McArthur, i. 280.

(7) Kennedy 289, published by Lt. Genl. Sir C. Colville when Commander-in-Chief, G. O. C. C. 9th June, 1823.

(8) Page 50.

(9) Page 128.

to enable him to meet the charges, by such evidence and reasoning as the case may require, and as he may deem expedient" (10).

4. *The rule in law.* *Blackstone* (11) states, that "in prosecutions for *Felony*, it is usual to deny a copy of the indictment, where there is any, the least, probable cause to found such prosecution upon" (12). But (13) "all persons, indicted for *high treason* or misprision thereof, shall have not only a copy of the indictment; but a list of the witnesses to be produced, and of the jurors impanelled, &c. ten days before the trial." "And no person indicted for *felony* is, or (as the law stands) ever can be entitled to such copies, before the time of his trial."

5. *The propriety and advantage of giving a copy.* It is not only proper to give a copy of the charge, but advantageous. With regard to the private soldier whose witnesses are, generally, in the barracks, if the copy be given a day before, it is enough. In the case of an officer, whose witnesses may be at a distance, the sooner a copy can be given, the better: and it would in any case, be highly improper to refuse

(10) Adye, p. 112, note, mentions the case of a Lieut. General (then Major General) Monkton tried on charges exhibited by Major Campbell. The copy of the charge which he had received differed from that in the warrant, and as given to him by the Secretary at War, some time before, and against which he had prepared his defence. He begged that the former charge (that which he had received, and not that read in court) might be read. The court were of opinion that the complainant be at liberty to prosecute the charges as stated in H. M.'s Warrant, to which M. G. Monkton must necessarily answer; and that, if in the course of his defence, it should be material to him to show, either that there was any *substantial* variation between the present charge, and that originally exhibited, or that the latter indicated any greater degree of malevolence, or for any other purpose, conducive to his defence; it might, then, be proper to lay the *first* charge, with his answer to it, before the court.

(11) Vol. 3, p. 126.

(12) Prosecution failing. "For it would be a very great discouragement to the public justice, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued whenever their indictments miscarried." *Ditto.* See State trials, 12, pp. 660, 1382, "a settled point at common law."

(13) Vol. 4, p. 351. *Ditto.*

to give a copy, which the custom of the *Army*, and the regulations of the *Navy* concede to the prisoner.

RULE PROPOSED.—There should be an article of war directing a charge to be given to the prisoner, as in the *Navy*, 24 hours before trial.

ADDITIONAL CHARGES.

1. The work entitled the *Military Law of England* (14) states, that "the present *(then)* J. A. G. (Sir Charles Gould,) having been lately questioned on this subject, gave it as his opinion, that *additional* charges, *foreign* to the *original* cause of a prisoner's arrest or confinement, are admissible, supposing they are *first reported to the person who has given orders for the process*, and by *him deemed proper* to be investigated; and supposing also that *the prisoner is served with sufficient notice, and allowed sufficient time* to prepare for his defence."

2. *Colonel Kennedy* states, (15) "If, after preferring certain charges against an officer or soldier, the prosecutor ascertains that the party has been guilty of further misconduct, it is competent for him to prefer *additional* charges against such officer or soldier. In which case, should these charges be submitted to the court-martial held for the trial of the prisoner *previous* to his *arraignment*, he is of course arraigned on both the original and additional charges in the same manner as if they formed only one single accusation. But if, before the receipt of the latter, the prisoner has *been arraigned*, and the trial commenced, the manner in which the court should, then, proceed, still remains a point which has not been yet *decided by competent authority*" (16).

(14) Page 121, note, (Mily. Arrangements, 66.)

(15) Page 50.

(16) The Bombay code, (Kennedy, p. 288.) Article 14, declares that "it is *strictly speaking* irregular for a court-martial to admit of additional charges being preferred against him, even although he may not have come on his defence. The trial on the charges first preferred must be regularly concluded; and then, if necessary, the prisoner may be tried on any further accusation that is brought against him."

3. *Captain Simmons* states, (17) that "A court-martial cannot entertain any additional charge, brought foward *subsequent* to the *swearing* of the court and the *arraignment* of the prisoner, either as referring to the charges in issue or to a distinct offence. This rule is not only established by the *custom* of courts-martial, but must result from the terms of the oath administered to each member: 'You shall well and truly try and determine, according to the evidence, in the *matter now before you*' (18). The prisoner is unques-

(17) Page 147.

(18) Tytler, p. 230. (*The oaths are to be administered once only,* marginal note) states, that "The writers who have maintained this opinion have grounded it on the words of the *charge* given by the J. Adv. *previous* to the *oath* of the members; 'you shall well and truly try, and determine, according to your evidence, in the *matter* now before you.' But, in the first place, the term *matter* being *generic,* will apply to every subject of criminal prosecution which is to be tried by the court: and, secondly, in the particular oath which follows, and which is taken by each of the members, the words are entirely *general,* applying to their duty as *judges;* with which character they continue invested, till the whole trials are finished, and the court is dissolved."

Sir C. Morgan, however, in his note, declared that they must be "sworn afresh for each trial:" and it is now ordered (Regulations and Orders for the army, p. 244). I have to observe that the members' *oath* commences with "I ——— do swear that I will duly *administer justice*" and is the oath of a *judge* as well as that of a *juror*. The oath to a *juror* is—"you shall well and truly try the issue joined between the parties, and a true verdict give, according to the evidence: so help you God." (Crown Circuit Companion, p. 544.)

As observed by *McArthur*, vol. 1, 316*. "The judges are only sworn once," (hence I suppose *Tytler* gave the above opinion) and p. 317, states "Prior to the statute 22 Geo. ii, it was customary for the J. A. (*naval* courts) to administer to the members on oath, of the same tenor as the preliminary one, used in the *army,* viz. "well and truly to try, and determine, the matter before them, between the *king* and the *prisoner to be tried.*"

The words "in the matter *now* before you," are incorrect, since the charge, like all indictments, is read *after* the court has been sworn. The words "between the *king* and the *prisoner to be tried,*" are clearly the old words, and more expressive.

The words of the *oath* "I —— do swear, that I will *administer justice,* &c." clearly contain the oath for a *juror* and also for a *judge,* the addi-

tionably amenable for any offence *unconnected* with the subject matter in issue, committed within the limited period, prior or subsequent to the date of arraignment, but such offence must form the substance of a separate charge, and the trial be distinct. The court, if ordered to try it, must pass judgment on the charges to which the prisoner has pleaded; and, being re-sworn, proceed independent of the former trial, as in ordinary cases."

4. I have replied to this passage in Captain Simmons' work before (19), and will here repeat a short passage of my opinion (20). "Though *military* courts are not bound by the strict rules of the *civil* courts, still it is not right or just to call upon any man to plead to several and distinct crimes. But an additional charge relating to the same subject, or continuation of misconduct, if due notice be given, and the prisoner be prepared, (and if not prepared time must be given him,) there can be no legal objection." I would not, as an additional charge, submit a charge for "*murder*," in the case of a prisoner under trial for "*embezzlement*." But, if other acts of embezzlement became known; or, if an officer broke his *arrest*, or committed a *contempt* of court, I would add the additional charges. I merely contend for the *right*.

5. The late Sir C. Gould, J. A. G. for 50 years, gives an opinion in favor of the legality of entertaining additional charges; Col. Kennedy only says that there is no decided authority. The Bombay code (21) states, that "it is *strictly*

tion of the words "without partiality, favor, or affection," belong to the *juror's* oath chiefly. The words "and I further swear, that I will not divulge the *Sentence*, &c." apply to the *judge's* oath. The words "neither, &c. will I disclose or discover the vote or opinion," belong to both characters. In fact "You shall well and truly try and determine, &c." are useless, and the members do not kiss the book on their being read, without which it is no oath, but after taking the oath: so that it seems clear that additional charges are not barred by the words "*matter now before you*."

(19) Improved articles of war (1836) p. 121.

(20) Page 122.

(21) See note 16.

speaking irregular for a court-martial to admit of additional charges being preferred against him;" thus not deeming the act *illegal*: Sir C. Gould requires the sanction of the authority ordering the trial. I have examined the proceedings of general courts-martial lodged in the J. A. G.'s office, Calcutta, for 45 years, and I saw no case where additional charges were admitted (and there are many), in which the court was re-sworn. If *new* matter being introduced requires a court to be re-sworn, it must occur even to try and determine a breach of arrest (22), or a contempt of court.

6. Rule Proposed. It would appear that there is no illegality in a court "trying and determining" any *additional* charges sanctioned by the authority ordering the prisoner's trial: provided the prisoner is served with sufficient notice, and allowed time to prepare his defence: for which purpose, if required, the court must adjourn.

Charges, immediate Trial of.

1. Charges should not be allowed to remain long uninvestigated. "H. M., adverting to what has appeared in the course of both these trials, has expressed his extreme disapprobation of keeping charges against an officer or soldier in reserve till they shall have accumulated, and then bringing them before a general court-martial collectively; whereas every charge should be preferred at the time when the fact or facts on which it turns are recent; or, if knowingly passed over, ought not, either in candour or in justice, to be in future brought into question (23).

(22) Captain Dunsmure, 1st Bn. 10th N. I. was arraigned in Ft. Wm. on 19*th* May, 1823, on eight charges and an additional charge was preferred against him. "For breach of arrest on the 21*st* inst. (May) in quitting Calcutta without leave, and failing to appear before the general court-martial assembled to investigate the aforementioned" (8) "charges on that day." *Sentence.*—Guilty of so much of the original charges as are stated in the finding, and of the *additional charge*. To be cashiered. Approved and confirmed, (signed) Edward Paget, General, Commander-in-chief; G. O. C. C. 5th June, 1823. In this case the court was *not re-sworn!*

(23) Cases of Captains John Cameron, and John Roy, held in Edinburgh, in March, 1798.—*Tytler*, p. 162, note.

2. "General or other officers commanding on foreign stations are restricted from sending home officers or men, with articles of accusation pending against them, except in cases of the most urgent necessity; it being essential towards the due administration of justice, that when charges are preferred, they should be thoroughly investigated on the spot" (24).

LIST OF WITNESSES FOR PROSECUTION TO PRISONER.

1. The author of the Military Law of England (25) states that the J. A. should furnish the prisoner with the names of the witnesses, (as far as he is able,) by which the charge is to be proved. *McArthur* (26) states, "from long established custom, it is deemed just and reasonable that the prisoner should be, in due time, furnished with the names and description of all the witnesses to be produced at the trial against him." *Tytler* (27) states, that he should have a list of the witnesses by which the charges are to be proved or supported. Sir C. Morgan, J. A. G. in his note observes: "I have never understood it to be the duty of a J. A. in all cases, to furnish the prisoner, previous to the trial, with the names, and designation of the witnesses, by whose testimony any act objected against him is expected to be proved." *Col. Kennedy* (28) states, that "it is not requisite." *Capt. Simmons* (29) quotes the opinion of Sir C. Morgan, but adds "although custom is, in most cases, opposed to the dictum of Mr. Tytler, yet there is much reason and justice in the argument." In the Bengal army it is directed (30), that a "list of witnesses for the prosecution should, in all practicable cases, be given to the prisoner;" but, where a prisoner demanded it as a *right*, the refusal by the J. A. was approved of (31).

(24) Regulations and Orders for the Army, p. 243.
(25) Page 99.
(26) Vol. i. 282.
(27) Page 358.
(28) Page 202.
(29) Page 130.
(30) G. O. C. C. 23rd Sept. 1826.
(31) G. O. C. C. 13th August, 1828.

2. Rule Proposed. Though the writers are equally divided on the subject, the opinion of Sir C. Morgan should prevail, and clearly there is no *right*. But, where practicable, and the giving the names, &c. of the witnesses for the prosecution to the prisoner may not be improper; or occasion their being tampered with, &c. by the prisoner; a list should be given to him, and the so doing might prevent him summoning other witnesses from a distance, to prove the same fact. *Adye* (32) says: "And it would not be improper for the prisoner to give in the names of such persons as he means to call upon as witnesses, in case they are officers, to prevent them, as well as the evidences for the crown, from being members of the court-martial (33)."

List of Members to Prisoner.

1. Tytler says (34), the prisoner should have a correct detail of the members of the court-martial. It might be useful to do so, as it might prevent, in some cases, challenges being made in court; and if a sufficient reason were given, another officer might be appointed; if the propriety of relieving him were doubtful, then it should be left to the court; I mean, particularly, in the case of the trial of an officer. If the J. A. gave the list to the officer to be tried, on hearing any objection which he knew to be valid, he might get the member relieved; or satisfy the prisoner that his objection would, most probably, be overruled. Such opinion might satisfy the prisoner, and might save the delay occasioned by an adjournment. The author of the Military Law of

(32) Page 113.

(33) *Kennedy*, p. 202, says, it has become the general practice on the meeting of the court, for the J. A. to lay on the table, the lists of witnesses for the prosecution and defence. *Simmons*, p. 131,—"is sometimes laid on the table." At *regimental* courts-martial, the serjeant-major makes out such lists, to enable him to warn the men. The J. A., usually, produces the list for the prosecution. Where there is no objection, it is a good plan to have both lists on the table.

(34) Page 358. The Military Law of England, p. 99, copies from Tytler.

England says, "the members being seated (35), the Judge advocate calls over their (members) names; and then reads the President's appointment, and, afterwards, the commission by which he officiates, as J. A., himself. This being done, and the prisoner to be tried being brought before the court, &c." No other writer quotes this custom. It is not usual; the orders, and warrants are read after the prisoner is brought into court. Commissions at the assizes are not read in the presence of the prisoners to be tried. The Warrant is the authority for the party to act, to whom it is addressed. It is not necessary, therefore, after the trial of one prisoner, to read again the Warrant on a new trial.

Irons or Fetters on Prisoners.

1. All the writers on military law copy from law books, as to the practice of using irons, or fetters on prisoners. *Blackstone* (36) says, that "between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only; though what are so requisite, must too often be left to the discretion of the gaolers." "Yet the law (as formerly held) would not justify them in fettering a prisoner, unless where he was unruly, or had attempted to escape." In the case of *soldiers* it is unusual to put them in irons unless violent, when it is necessary to do so (37).

2. *When brought into court.* Blackstone (38). "He must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with

(35) Page 101.

(36) Vol. 4, p. 300.

(37) Private Patrick Murray, H. M.'s 31st foot was tried for having violently struck Assistant Surgeon James, and a serjeant in the execution of their duty, also two soldiers while they were securing him; he was in consequence handcuffed, while in confinement. See G. O. C. C. 18th (17th) Nov. 1837, for his trial.

(38) Vol. 4. p. 322.

irons." *Mr. Christian* adds to the 15th edition, in a note: "It has since been held that the court has no authority to order the irons to be taken off, till the prisoner has pleaded and the jury are charged to try him." On a trial, at Dinapoor, Private Patrick Murray, H. M.'s 31st Foot, (39) while the Warrants were being read struck one of the sentries over him, a violent blow in the face, in open court; I recommended the court to order him to be hand-cuffed, and his arms to be tied behind him, which was done; and he remained so during the whole trial, the fact being recorded on the proceedings.

3. RULE PROPOSED. There seems to be no legal objection to putting irons on a prisoner, during his trial, if he is unruly or violent; though there may be no danger of an escape or rescue; protection is due to the persons of those who guard him: and he by his own violent conduct, renders the measure necessary.

JUDGE ADVOCATE IF TO ASSIST THE PRISONER.

1. Sullivan (40) says—"The J. A. is allowed to restrain the delinquent from advancing any thing to criminate himself." *Adye* (41) says, "it seems to be generally expected, that he should assist the prisoner in his defence, particularly if a private soldier. This (if it is a part of his duty) must have arisen merely from custom, for I know no authority for it." The author of the "Military Law of England" (42) quotes *Sullivan*. McArthur (43) says, that he should give "reasonable assistance to the prisoner in his defence, either in point of law or of justice. It is his duty, that the proof, both on the part of the crown and the prisoner, should be properly laid before the court. And where any doubtful point may arise, he should rather incline to the part of the prisoner; and nothing should induce him to omit any circumstances, in the minutes of the proceedings, that may have a tendency to palliate the charges against the accused."

(39) See note 37.
(40) Page 39.
(41) Page 101.
(42) Page 123.
(43) Vol. i. 291.

Tytler (44) says, "Another part of the official duty of the J. A., which though not enjoined by any particular enactment of the military law, has yet the sanction of general and established practice, is, that he should assist the prisoner in the conduct of his defence," and (45) "for that purpose, that he should either converse with himself, or with his counsel, before proceeding to trial."

2. Sir C. Morgan in his note to Tytler, says, "I must confess I am decidedly of a different opinion from Mr. Tytler, with regard to the propriety, or expediency, of the J. A. having a personal conference with the person to be tried, and learning the scope of his defence; and have rather avoided than courted an anticipation of the prisoner's defence." Col. *Kennedy* (46) says, "It is also expected that the J. A. if consulted, by the prisoner, should give him the best information and advice in his power. But an opinion which has long been prevalent in the army, that it was the *official duty* of the J. A., to assist the prisoner in the conduct of his defence, appears to be no longer maintained," and alluding to his duty for crown, adds—"In court, therefore, it is not in the power of the J. A. to afford the prisoner any effectual assistance; for, there, he could neither advise him nor frame questions for him" (47).

3. *Simmons* (48) says, "It is more consonant with the custom of the service, that the J. A. should only interfere to the extent to which the court itself is bound to interpose; to take care that the prisoner shall not suffer from a want of knowledge of the law, or from a deficiency of experience or ability to elicit from witnesses, or to develop by the testimony, which in the course of the trial may present itself,

(44) Page 355.

(45) Page 360.

(46) Page 203.

(47) He adds in a note, p. 204. "A prisoner, however, may give the J. A. a memorandum of the points on which he wishes his own witnesses to be examined, and the opposite party cross-examined; or a list of questions to the same effect, and request him to put only such as he thinks necessary, and to frame the questions in his own words."

(48) Page 152.

a full statement of the facts of the case, as bearing on the defence. To this extent, the court-martial and J. A. are bound, it is conceived, to offer their advice to the prisoner. Justice is the object for which the court is convened, and the J. A. appointed."

4. *Consulted by prisoner before trial.* An officer officiating as Judge Advocate, once asked the Judge Advocate General if he might speak to the prisoner before trial, his reply was—" I do not conceive there is any objection to your acceding to the desire of a prisoner to attend him previously to trial; if any good can be the result" (49). I conceive great good may often result, particularly in the case of a private soldier; the J. A. is more free from bias, it may be supposed, than any other person. And in the case of an officer, particularly where the J. A. is not the prosecutor, he may be looked upon in the light of a moderator. If he is the prosecutor, even, his advice may be of more use than that of even a friend, who will naturally take only one view of the case, that in favor of the accused.

5. Rule Proposed. Though the J. A. is not *officially bound* to assist the prisoner, it is highly proper that he should do so as far as he can without neglecting his duty. He cannot be of so much assistance during the prosecution, as on the defence. While no J. A. should omit to produce, or to point out to a prosecutor the production of, any evidence to prove the charges; he may, still, advise the prisoner to refrain from putting questions which may either be of no use or tend to lengthen the proceedings. Till the prisoner comes on his defence he has no evidence to produce; but, during the prosecution, the object is to prevent the prisoner committing himself, in any way, either by speaking or writing.

Prosecutor.

1. The J. A. used, formerly, always to be the prosecutor, but in modern times, it has been the custom to appoint an officer to be the conductor of the proceedings. The rule

(49) Letter, No. 2374, J. A. G. O. 27th July, 1830.

in the *Bengal* army is (50), "If a crime be of a *general* nature, and not an injury to an *individual*, to call on the person preferring the charge to appear as prosecutor, and the J. A. is to submit to the general officer, &c. commanding the division, &c. the expediency, generally, of the officer commanding the regiment or department to which the prisoner may belong, being required to sustain the prosecution.

2. Captain Simmons states (51), that "By the custom of the service, the actual duties of prosecutor more frequently devolve on the individual originating the charge, or on a staff officer ordered to perform the duty; it is, however, always considered to be at the suit of the king. No person, except the J. A. can appear as prosecutor before a court-martial, who is not subject to martial law" (52). Major General Sir C. Dalbiac, president of the court of inquiry, 16th Nov. 1831, was the prosecutor on the trial of the late Lieut. Colonel Brereton and Capt. Warrington, for their conduct during the Bristol riots.

The J. A. G. (*Quentin's* trial, p. 34) said (1814), "It has always been the practice, since I have been in office, and with my predecessors (unless there was some reason why it could not be so managed), that somebody should be appointed prosecutor."

3. *Joint Prosecutors.* Sometimes joint prosecutors are appointed, as in the case of the late Lieut. Genl. Sir J. Murray, Bart. (53). There were two charges relating to his conduct in the siege and operations before Tarragona, in June, 1813, and a 3rd charge regarding the hastily re-embarking the forces and abandoning artillery, stores, ammunition, &c. which might have been embarked in safety, Admiral Hallowell engaging to effect the same. The officiating D. J. A. G. conducted the 1st and 2nd charges, and on the third

(50) Circular, J. A. G. No. 178, 15th June, 1832. In the *Bombay* Army there is a similar rule, Code of Mily. Regulations, section xx. 29.—Kennedy, p. 292.

(51) Page 153.

(52) "Must be a military person." G. O. C. C. 26th July, 1827.

(53) G. O. H. G. 17th Feb. 1815.

charge the admiral was the prosecutor, and directed to be such by a letter from the Secretary of State (54).

INFORMANT.

In the *Bengal* army, "In cases of a *civil* person being complainant, he becomes the principal witness, and after giving his evidence, should be allowed to remain in court, that the J. A. may refer to him" (55). In the *Bombay* army the rule is, (56) "But if the person bringing formed an accusation against any person in the army is not himself an officer, either in the naval or military service; he cannot appear in court as the prosecutor, but merely as an informant, and in that case the J. A. conducts the prosecution."

AMICUS CURIÆ.

1. *Adye* (57) says, "Counsel, or at least *Amici Curiæ*, have been allowed to prisoners, at courts-martial, in all cases." *McArthur* (58) says, "It is likewise the practice at courts-martial to indulge the prisoner with counsel, or at least *amici curiæ* (or friends of the court), who may sit or stand near him, and instruct him what questions to ask the witnesses, with respect to matters of fact before the court; and these friends should commit to paper, the necessary interrogatories as they may arise, which the prisoner gives on separate slips to the J. A."

In the *Bombay* army it is directed that (59) "the prosecutor and prisoner, on requesting it, are to be allowed the assistance either of a friend or of a professional gentleman. But no person is on any account to be permitted to address the court, or to interfere in any manner with its proceedings except the parties themselves."

(54) Printed trial, p. 74.

(55) G. O. C. C. 26th July, 1827.

(56) Mily. Regulations, section xx. 30.—Kennedy, p. 292.

(57) Page 103; so also, Author of Mily. Law of England, p. 124, quoting McArthur.

(58) Vol. 2, p. 44. See Delafons, 166.

(59) Mily. Regulations, xx. 31.—Kennedy, 292.

2. In the worst times a prisoner has been allowed an *Amicus Curiæ.* On the trial of *Algernon Sidney,* for high treason, 35 Charles 2, 1683, *Mr. Bamfield,* who had been one of the counsel assigned to advise with Sidney, as appears by Sir W. Williams's MS. addressed the court of K. B. against passing judgment as follows: "Sir, I pray you to hear me one word as *Amicus Curiæ;* I humbly suppose that your Lordship will not give judgment if there be a material defect in the indictment; as the clerk did read it, he left out *defensor fidei,* which is part of the stile of H. M." (60).

3. *Where refused, disapproved of.* Where a *district* court-martial refused to allow a private soldier a friend *(Amicus Curiæ),* the Commander-in-chief remarked "though he may be refused any particular individual who has not obtained leave, still the prisoner should be allowed one, as he is at a *general* court-martial; and the same principles of justice give it in the former case" (61).

4. Rule Proposed. That all the writers on military law, and all military authorities, and the custom of all the courts of law give the prisoner an *Amicus* (or *Amici) Curiæ.* It is not only just, but may be of service to the court, by restraining the conduct of the prisoner (62).

Counsel for Prisoner.

All the writers on military law admit it to be the custom to allow a prisoner to have counsel (63).

(60) State Trials, ix. 901.

(61) G. O. C. C. (Bombay) 20th March, 1832, para. 7.

(62) In the case of Bombardier Silke, tried at Benares, for manslaughter, a man came to me and said he was desired to report himself to me, as the person to assist the prisoner. The Bombardier had killed a gunner in a fight, and as the person chosen as a friend for the prisoner was known to be what is termed a "lawyer" among the men, and a troublesome character, I spoke to the Bombardier and advised him not to allow the man *(Lowe)* to appear in court, and I would assist him; to which he assented, (G. O. C. C. 26th August, 1837.)

(63) Sullivan, 41. Delafons, 166. Adye, 103. Mily. Law, 124. McArthur, ii. 44. Tytler, 251. Kennedy, 62. Simmons, 156.

Charge if read to Court before Arraignment.

1. Captain Simmons says (1), "It is not only within the *power* of a court-martial, but a *duty*, the neglect of which may incur censure, to judge of the propriety of the charge, not only as regards the nature of it with reference to their *jurisdiction;* but also, whether the wording be sufficiently precise and the crime clearly defined. It would perhaps conduce to regularity, and might occasionally obviate much inconvenience, if courts-martial were, invariably, cleared on the reading of the charge, before the arraignment of the prisoner, to consider its relevancy." And he alludes to the case of Captain Peshall, 88th regiment (2) tried, at Ariscum, in Spain, in which H. R. H. P. R. remarked on the *vagueness* of the *wording* (3) of the charge, and observed "the conduct of the prosecutor and *the court* appear to have been irregular, one in preferring an accusation so indirectly framed, and the other in *receiving* it."

2. *If defective adjourn.* In the Bengal army there is an order (4) which states, "and it is the duty of the Judge Advocate to remonstrate against the court's proceeding to trial on a charge that is deficient in accuracy or perspicuity." This has occurred in a case in which the superintending officer of a *native* regimental court-martial exhibited charges against the Comg. officer of his regiment for an illegal infliction of a sentence of corporal punishment awarded by the court contrary to the sentence. The J. A. G. recommended the court to adjourn, which they did (5). In the case of Major Everard, 14th foot, tried on charges framed by the late

(1) Page 137.

(2) G. O. H. G. 13th Dec. 1813.

(3) The charge was "absence without leave from the 24th June, to 28th July, 1813, (during which period his corps was employed on service) and coupled with his *conduct* on *some former occasions*, raising, at least, a suspicion that it was intentional." (James's Decisions, p. 573). Had these charges been corrected by a J. A. he would not have inserted the *vague* words "on *some former occasions*."

(4) G. O. C. C. 8th Feb. 1802, (*Lord Lake.*)

(5) G. O. Capt. Genl. (*Marq. Wellesley*), 22nd Nov. 1802.

Colonel McCombe, his Comg. officer, wherein he was charged with "systematic slight on *various occasions*," on the Major being asked to plead begged that *dates* might be assigned; dates were assigned by the prosecutor by order of the court, for which purpose they adjourned (6). But if the prisoner plead a "*Misnomer*," the court may ask the prisoner what is his real name, and call upon him to plead to the amended charge" (7).

Members in Waiting.

1. I believe, the practice of having members in *waiting* still prevails in the *Madras* army. *Sullivan* (8) states that "whenever members are in waiting, it is right that they should regularly sit and be present at all deliberations, even when the court is cleared; as otherwise, the sudden indisposition of a member in the last stage of a trial, may, for the information of his substitute, occasion its recommencement. *Members in waiting, however, have no voice; neither can they be permitted to be* present when judgment is passing." Again (9), "The president, members, *members in waiting*, and the J. A. are duly *sworn*."

Tytler (10) after remarking that instead of 13 members, there may be double that number, states that "every individual of that number must be sworn a member, and is by law invested with the same deliberative and judicial powers as his fellows;" and adds in a note, that if 2 out of 15 were to withdraw (as members originally in waiting and not required), and 9 were to vote a sentence of death, whereas 10 (⅔rds) would be required with a court of 15, the life of the prisoner must have been saved. *Sir C. Morgan* in his notes to Tytler (11) observes that "it has happened that officers

(6) G. O. C. C. 3rd Dec. (K. T. 29th Nov.) 1822.

(7) 9 Geo. iv c. 74, s. 11. Thus where the prisoner was styled *John* and said his name was *James*; the J. A. altered it to James in court. G. O. C. C. 10th Oct. 1832.

(8) Page 103.

(9) Page 95.

(10) Page 137.

(11) Page 311.

have been sworn, and have been stated on the proceedings, as in waiting, and have withdrawn when the court have come to a decision ; this practice is very erroneous."

3. In the *Bombay* army, the practice does not prevail. *Colonel Kennedy* states (12), "These (members in waiting) are not considered in the same light as the members in waiting who *formerly* took their seats at courts-martial, butdid *not vote*. But as it is sometimes understood, that exceptions (challenges) will be made, officers are ordered to be in attendance in case of their being required as members ; and should this not be the case, they return to their regiments as soon as the court is sworn in" (13). So that if the *Madras* army adopt the above bad practice, it must have been copied from *Sullivan* ; and is not the practice of the army.

4. Rule Proposed. It appears that no officer who has once been sworn at any court-martial as president or member, can retire from his place as such ; unless by death, or certified sickness (14).

Challenges.

1. *As to the President, or Member, of the previous Court of Inquiry.* Sullivan (15) says "Members of a court of inquiry are liable to be excepted against as members of a court-martial ; that is, if they shall sit as members on the same cause." *Delafons,* (16) that "Those who have acted as members on a court of inquiry into the prisoner's conduct, should not be permitted to sit on his court-martial; since they are held, in many respects, in the light of a grand

(12) Note to p. 320.

(13) Page 18 states that the additional members vote and give their opinion, the same as other members.

(14) In the navy "no member shall absent himself from the said court during the whole trial, upon pain of being cashiered ; except in case of sickness, *or other extraordinary and indispensable occasion, to be judged of* by the said court." 19 Geo. iii. c. 17. McArthur, vol. 1. p. 350.

(15) Page 20.

(16) Page 123.

jury." *Adye*, (17) that "Members of a court of inquiry (which I have already observed, may in some measure be compared to a grand jury) may therefore by this statute (25 *Edw.* 3, *c.* 3), be challenged and excepted against, as members of a court-martial; held either for the *same cause*, or upon the trial of another action, in which the *same matter* is in question, or happens to be material, though not directly in issue; as is expressed in the statute, if they have given an *opinion*, as they are sometimes directed to do." The author of the Mily. Law of England (18) that "Members of a court of inquiry in the *same cause* or *same matter* are liable to be excepted against as judges." *McArthur*, (19) that "A most obvious cause of challenge, and which it would be the duty of a J. A. to anticipate, may be made against any officer, sitting at a court-martial, who had previously sat at a court of inquiry and given his *opinion* on the matter at issue." *Tytler*, (20) that "A court of inquiry bearing a near affinity to a grand jury, and the law being precise on that point, that no grand juror who has found a bill of indictment against a prisoner, can be a member of the petty jury on the trial of that prisoner, or even on the trial of another, wherein the *same matter* is in question: (25 *Edw.* 3. *c.* 3. *Hen. iv.* 2 *Pl.* 4,) it seems to be thence with much reason concluded, that it is sufficient ground for challenging the member of a general court-martial, that he had given his *opinion* of the cause in a previous court of inquiry."

2. *Captain McNaghten*, (21) that "Suspicion of prejudice, and the previous expression of an opinion on the case, are considered two of the most valid causes of challenges that can be urged." *Kennedy* (22) that "The having been a member of a court of inquiry on the same subject which had given an *opinion*; but if the court had not given an opinion, the member cannot be objected to." *Simmons*,

(17) Page 151.
(18) Page 103, note.
(19) Vol. i. 275.
(20) Page 223.
(21) Page 104.
(22) Page 30.

(23) that "An officer's having been a member of a court of inquiry held to investigate the subject of the charge, the court having given an *opinion*, is admitted as a valid cause of challenge; and it is believed to be equally so where the court has *not* given an opinion. The contrary position is entertained in a recent soldier-like work on courts-martial (24). It will be granted without difficulty that a judge or juror ought, as far as practicable, to enter upon the investigation of a charge without prejudice, without the bias which *ex parte* statements are calculated to create. Now the proceedings of a court of inquiry may be, and generally are, *ex parte* allegations tending to attach criminality, or to establish facts upon which subsequent charges may be built. If the accused be permitted to enter on explanation, the statements in his favor are equally without the sanction of an oath, which the custom of all courts, and the statute law as to courts-martial, render necessary. It would therefore, it is apprehended, be quite incompatible with a fair and equitable trial, that a member of a court-martial should be thus exposed to the impression of statements by individuals neither on oath, nor subject to cross examination."

3. Out of nine writers five are of opinion that the member of the court of inquiry should not be a member of the court-martial to try the same cause, *if an opinion* has been given, and four that he should not be a member whether he has, or has not, given an opinion. I am very much of *Simmons's* opinion; but I view the subject in two lights:—1st, in a *legal*, 2nd in a *military* point of view. In the legal sense, there being* no opinion given, the analogy between the court of inquiry and a grand jury ceases. They merely record the evidence submitted, but still they *mentally* and *morally* do form some opinion, and may learn more than the grand jurors, by hearing both sides; though the evidence be not on oath, still, for the time, the evidence is supposed to be the truth, without an oath; and a knowledge of facts must, in some degree, prejudice the mind; particularly, if the

(23) Page 165. (24) Kennedy, p. 30.

evidence be heard on both sides; for though the juror finds a true bill, because he hears facts sworn to, still, if at a court of inquiry, the defendant brings forward evidence which does not make a favourable impression, it must add strength to the prosecution, and lead to the forming even though mentally only and though not expressed, an opinion adverse to his cause. However, he is not compelled to adduce any evidence, and if of a doubtful character may reserve it for his defence on his trial: and he is usually advised to do so: but, where the accused can rebut the charge he will often do so, and if he does so partially it may be inferred that there is *some* guilt.

4. In the *military* point of view, in the ordinary barrack transactions which are of clear proof, and where, as in mutinous or insubordinate conduct, striking a N. C. O., desertion, absence without leave, &c., the guilt of the prisoner is usually the opinion of 10 or 12 out of 13 (if not of the whole) officers composing the court; I never object to the members of the court of inquiry in such cases. In cases of murder, manslaughter, and non-military cases, I advise that the officers who were on the court of inquiry, should not be on the court-martial. There is also this to be considered. The *whole* 12 of the jury must agree—in a court-martial the majority, or 9 out of 13, or ⅔rds only are required; so that the, say, three officers who were on the court of inquiry, may not affect the verdict. Again, the prejudice of one juror may defeat justice; 11 may think the prisoner guilty; the 12th juror may believe him innocent; and the crown as well as the prisoner is to be considered. It may be said at a court-martial, the member who is prejudiced against the prisoner will vote a more severe punishment; but, in military cases, officers usually award the punishment due to discipline; and all must vote *some* punishment, and the most severe punishment if voted by such prejudiced member, cannot be carried without the consent of the *majority:* so that I can declare that in ordinary military cases, the prisoner will not suffer by the members of the court of inquiry being members.

5. Rule Proposed. I would propose, that in ordinary military trials, where no opinion has been given, the members of a court of inquiry should be allowed to sit on the court-martial to try the same offence. But that, in the cases of murder, man slaughter, and non-military cases, the members of the court of inquiry should not be on the court-martial. The rule to apply to general and district courts-martial—provided that, if it be practicable, and can be conveniently done, no member of a court of inquiry, should be put on the court-martial.

6. *Challenges by the J. A. or prosecutor, as well as by the prisoner.* The Bombay military code (25) gives the right of challenge to "both the prosecutor and prisoner." But the prisoner it seems first challenges. "The rule respecting the time of making a challenge in criminal cases is, that the prisoner should declare whether he challenges, before the counsel for the crown are called upon" (26).

7. *Challenge of President.* The rule in the Bombay military code (27) is, "But they (prosecutor and prisoner) cannot object to the President as he is appointed by warrant;" this is as *Kennedy* says (28) erroneous and quotes the words of *Sir C. Morgan* (29). "The *president* of a court-martial cannot be objected to, by challenge, in the *same manner*, as the members may be; he being named in the order or warrant for the trial. If therefore any objection be urged against his appointment, care must be taken to have such objection clear and specific; the court must then separate, and the objection must be referred for decision to the authority under which his name was inserted in the order, or warrant." *McNaghten* (30) and *Simmons* (31) are of opinion the president may be challenged; the latter in

(25) Section xx. 24. Kennedy, p. 290.
(26) State trials, 32 vol. 774, and 16 vol. 135.
(27) Section xx. 24. Kennedy, 291.
(28) Page 29.
(29) Note to Tytler, p. 220.
(30) Page 103.
(31) Page 160.

the manner stated by Sir C. Morgan. On the trial of Lieut. General Sir J. Murray, (1813) the officiating D. J. A. G. said he could not challenge the president (32). The note by Sir C. Morgan though prior to 1815, decides the point, he having been the J. A. G. The rule of law is that *all* jurors may be challenged for cause shewn, and the president being only a member as to the vote, opinion, and sentence, ought, in all justice, to be liable to be challenged. The president is seldom challenged, and is *sometimes* selected by the officer ordering the court. In *native* courts-martial, the *senior* is usually directed to preside. In *native* general courts-martial the president is appointed in orders, and is the senior of the native officers whose names are sent in. In *European* general courts-martial he is named in orders; and the corps furnishing field officers, must consequently send the names of those *junior* to the president.

8. *President must be challenged in certain cases.* The president of a *district* court-martial is not to be under the rank of a field officer (unless one cannot be had), nor the Comg. officer of the district, or of the prisoner's regiment (33). The president of a *general* court-martial (34) "shall in no case be the officer Comg.-in-chief, or Governor of the garrison where the offender shall be tried, nor under the degree of a *field officer,* unless where a field officer cannot be had; nor in any case whatsoever under the degree of a *Captain.*" In either of these cases, it would be the duty of the J. A. to challenge the president if appointed contrary to the above orders. If the president (a *Captain*) had been president of the *regimental* court-martial appealed from; or if the president had been president or member of a court of inquiry; having given an *opinion*; the J. A. should challenge them. In all other cases the prisoner and prosecutor would challenge, for cause, in the same manner as in courts of law.

(32) Printed trial, p. 1.
(33) Warrant to hold district courts-martial.
(34) Article of War, 71.

9. Rule Proposed. That the president and members of general and district (35) courts-martial may be challenged by the prisoner and J. A. or prosecutor; for cause assigned: but that if the *president* be challenged the court should record the objection, and if *necessary*, report the cause. For it may be satisfactorily proved to the prisoner, that there is no valid cause.

10. *Challenges at regimental courts not allowed of right.* Captain Simmons (36) says under the head of *regimental* courts-martial, " It is not usual to ask the prisoner whether he has cause of challenge against an officer detailed for his trial; though if he offer such as to render an officer ineligible as a member, it must necessarily be entertained by the court; or its proceedings may be so vitiated as to invalidate its sentence."

2. It was remarked by the *Marquess of Hastings*, when Commander-in-chief in India (37), that " such a privilege is not analogous to British law, except on capital charges, which the inferior courts-martial cannot entertain. A prisoner, before being brought to trial in one of the inferior courts, should always be informed by direction of the officiating J. A. or superintending officer, that if he have any reasons for surmising any particular member or members to harbour animosity or violent prejudice against him, or can charge any one of them with having declared beforehand the judgment he would pronounce, the court would upon such a statement discuss the case with its proofs, and confirm or overrule the objection according to their opinion of its validity. The prisoner will thus have all equitable security, without room being left for public misconstruction. Hence, the Commander-in-chief enjoins all courts-martial inferior to general courts-martial not to invite a challenge without the above explanation, and not to admit one but on

(35) M. G. Sir J. Macdonald, A. G. H. M's. Forces, in his evidence before the Mily. Commission (1835) said challenges were allowed at *Genl. Regtl.* courts-martial; now, *District* courts-martial.

(36) Page 65.

(37) G. O. C. C. (Bengal) 6th May, 1820.

just cause assigned and proved to the satisfaction of the court."

11. *Judge Advocate cannot be challenged.* The Bombay code of Military Regulations (38) declares that neither the prosecutor or prisoner can object to the Judge Advocate, as he acts on behalf of the crown. *Captain Simmons* (39) says, "The J. A. or his deputy cannot, on any grounds, be challenged; as well might the Attorney General be objected to in the court of King's Bench."

12. *The challenged member withdraws.* In the Bengal Army (40) "If the prisoner, &c. challenges, the member withdraws, and the court is cleared, and when opened, the member is informed he is to retire from the court as a member. If the challenge be disallowed, he resumes his seat." The *Bombay* Regn. is the same (41), and Colonel Kennedy gives the same opinion (42) and *McNaghten* states (43) "The officer challenged, should not be present at the ensuing discussion; this, on the principle which obtains in courts of law." As challenges are for cause stated at courts-martial, such should be in writing. In courts of law the cause is stated, in open court, just as the witness "comes to the book," should the cause of challenge be prejudice I think it may as well be concealed from the knowledge of the member.

13. *Challenges if allowed, after members have been sworn.* Sullivan (44) says, 'No member, can be excepted against after the formation of the court, neither can an ignorance of his former character be pleaded against him, unless he shall have perpetrated some deed, or have been principally or accessarily concerned in the commission of some act,

(38) Section xx. 24. Kennedy, p. 291.
(39) Page 160.
(40) M. S. J. A. G. O. p. 91.
(41) Section xx. 25. Kennedy, p. 291.
(42) Page 29.
(43) Page 106, note.
(44) Page 14.

subsequent to such formation, which shall be adduced as guilt against him." *Adye*, (45) "No juror can be challenged, either by the king or prisoner, *without consent*, after he hath been sworn, whether on the same day, or on a former; unless it be for some cause that happened since he was sworn." *Tytler*, (46) "There is no reason of justice, or of common sense, that should preclude a prisoner from challenging, on sufficient cause, any of the members *after* the court is sworn: provided he had no opportunity of moving his objection *before* that form was gone through. An objection cannot be said to be waved, which the objector had no power of urging." As *Sir C. Morgan* has not objected to this opinion, great weight is due to what Tytler has stated.

2. *McNaghten* (47) says, "I think a case might be supposed of so strong a nature, that the judge would receive a challenge even after the jury had been regularly empannelled." On the trial of Col. Morris, at the Assizes at the Castle of York, before two judges, for high treason, (1 *Charles* 2, *A. D.* 1649,) (48) a challenge of a juror after the oath was administered, but before the juror had kissed the book, was held to be too late;" but in those times prisoners were hardly dealt with.

3. Rule Proposed.—I think there should be a Rule that, if any good and sufficient cause of challenge shall be known after the member shall have been sworn; such as that the member had said "that the prisoner was guilty, or deserved to be hanged," tampering with the witnesses (49),

(45) Page 147.

(46) Page 231.

(47) Page 173.

(48) State Trials, vol. iv. p. 1255.

(49) Simmons, p. 163, cites a case, in the year 1718, "an officer tried at Gibraltar by a court-martial, for killing another; the prisoner challenged two of the members; the first, for tampering with one of his witnesses; the other, for declaring before the trial came on, that he deserved to die; both were proved, and admitted by the court to be just and reasonable exceptions; whereupon they were both dismissed, and others sworn in their room." (*Simes's* Mily. Library, vol. iv. p. 64.)

or the like, that the prisoner might challenge such member, though such fact became known after he had been sworn, and the trial had commenced, and that if the court consisted of the legal number, without such member, the court might direct such member to retire. If reduced, by his withdrawing, below the legal number; then, that another member should take his place; and the evidence be taken *de novo*, and such new member should be sworn, subject to the usual challenge.

14. *Causes of Challenge.*—Blackstone, (50) " A principal challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favor: as, that a juror is of kin to either party within the 9th degree; that he has been arbitrator on either side; that he has formerly been a juror in the same cause; that he is the party's master, servant, &c., these are principal causes of challenge; which, if true, cannot be over-ruled, for jurors must be *omni exceptione majores.* Challenges *to the favor,* are where the party hath no principal challenge: but objects only some probable circumstances of suspicion

It is clear that if such had occurred *after* the members had been sworn, that they should have been challenged. *Russell* on Crimes, vol. ii. p. 589, says, " where the defendant has been convicted on an indictment for *felony,* there can be no new trial; but after a conviction for a *misdemeanor,* a new trial *may* be granted, at the instance of the defendant, where the *justice of the* case requires it." (*Rex v. Mawbey,* 6 T. R. 638).

Archbold's K. B. Practice, vol. ii. p. 254, says, a new trial will be granted for the misconduct of the jury " if the misconduct be such as to satisfy the court that the verdict has been determined on, without that grave and serious deliberation, that right exercise of judgment, and that total absence of all partiality, so necessary to the proper execution of the important duties of jurymen:" and p. 225, "*or if any of them have previously declared that the plaintiff should never have a verdict.*"

Russell says, a new trial may be granted in the case of a *misdemeanor,* but not in *felony,* which seems strange law; and if, as *Archbold* says, there may be a new trial in *civil cases,* there should be in *felony* " *where the justice of the case requires it.*"

In military trials, therefore, either there should be a new trial, or the judgment should be set aside.

(50) Vol. iii. p. 363.

as acquaintance and the like; the validity of which must be left to the determination of *triors,* whose office it is to decide whether the juror be favorable or unfavorable."

2. "Challenges *propter delictum,* are for some crime or misdemeanor, that affects the juror's credit and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or of some infamous offence he hath received judgment of the pillory, or the like." "Sick and decrepit persons, men above 70 years old, and infants under 21 years are excluded."

3. It is no valid objection that the member belongs to the prisoner's Regiment or Company. Where the member, the Captain of the prisoner's company, having examined the witnesses on both sides, and expressed a wish that the prisoner should be tried by a *general,* instead of by a *district,* court-martial, such cause of challenge being over-ruled by the court, has been disapproved, as indicating a preformed opinion of the prisoner's guilt; and the sentence was not confirmed (51).

A juryman was set aside on the trial of *James O'Coigly and others,* for high treason, who looking steadfastly in the face of all the prisoners, quite close to them; clenched his fist, and exclaimed "*damned rascals*" (52). Where the officer whose property had been attempted to be stolen, by the prisoner, had been a member of a garrison court-martial the J. A. G. advised the sentence to be remitted (53).

15. *Challenge of the Array.* On the trial of Col. Vans Kennedy in 1836, for writing a letter in one of the Newspapers regarding his removal from his situation as J. A. G. of the Bombay Army, the Colonel challenged the array, that is the whole court, president and members, because there were, out of 15 officers, 4 Captains; and because another field officer (a Lieut.-Colonel) had been tried by a court composed wholly of field officers. The court overruled the objection.

(51) G. O. C. C. 6th May, 1834.
(52) State Trials, vol. xxvi. p. 1226-9.
(53) Simmons, note at p. 327.

2. *Blackstone*, vol. 3. p. 359, says, "Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality or some default in the sheriff, or his under officer who arrayed the panel." Under Section 14 and article 7, Company's Articles of War, (and 71st article, annual articles of war,) it is declared that "no *field officer* shall be tried by any person under the degree of a *Captain*."

3. Col. K. in his last work (1832) no where mentions the "challenging the array," therefore it is a new doctrine of his. It is singular that a J. A. G. who had been such for 19 years, and 10 years previously a D. J. A. G. (vide note to his preface, p. iv.) should, after 29 years' experience entertain an opinion quite at variance with the Articles of War; for *all* the members might have been *Captains*, and even the president might have been a Captain "where a field officer cannot be had" (Article 2, of the above section).

4. If the Colonel held the notion that there should have been *no Captains* as members, he should have challenged them, but he had no right to challenge the president and 10 field officers; for he assigned no such cause as "partiality," &c. Lieut. Fast, 59th (Bengal) N. I. on a charge preferred by Capt. T. of the same regiment in his challenge before the general court-martial, Cawnpoor, 8th July, 1833, said "I have but one challenge to make. It was by *this* court Captain T. was tried and acquitted; (G. O. C. C. 24th June, 1833) after the opinion it has passed upon that officer, I of course cannot allow myself to expect to be now acquitted by it. I must beg to decline either to plead, or to make a defence before this court-martial." The court admitted the challenge, and the D. J. A. G. was directed to report the same to the general officer Comg. the Division: and a new court was formed on the 29th July, 1833. He was convicted, and sentenced to be discharged the service. But disapproved, as the "sentence has been vitiated and rendered invalid, by an illegal division of the votes upon the finding" (G. O. C. C. 19th Dec. 1833).

5. It was remarked by the J. A. G. in a letter to the Adjutant General (No. 168, 24th July, 1833) in the above case, "If the prisoner refuse to plead, it subjects him to the same procedure as standing mute; and if he declines making any defence, it is at his own risk, it cannot operate to impede the regular course of judgment."

MEMBER'S ATTENDANCE DISPENSED WITH.

McArthur (54) says, that "By the act 19 Geo. 3. c. 17 amending the act 22 Geo. 2. c. 33 it is enacted, "that the proceedings of Naval courts-martial shall not be delayed by the absence of any of its members, provided a sufficient" (*legal*) "number doth remain to compose such court, which shall and is hereby required to sit from day to day (*Sundays* always excepted) until the sentence be given; and no member of the said court-martial shall absent himself from the said court during the whole course of the trial, upon pain of being cashiered from H. M.'s service; except in case of sickness" *(duly certified)* "*or other extraordinary and indispensable occasion to be judged of by the said court.*"

It appears, however, on the trial of an officer, in 1780, though the president wrote to the Admiralty regarding the dispensing with two members, whose ships were under orders for the West Indies, and though their Lordships approved of the application; the court *were of a contrary opinion*" (55).

RULE PROPOSED. There should be a similar rule in the *army*, as there is in the *navy* (56). That so long as there

(54) Vol. i. p. 234.

(55) Ditto, Appendix, vol. i. p. 421.

(56) When J. A. at Cawnpore, on the trial of an officer (*G. O. C. C. 26th Nov.* 1828), one of the members, a *Major*, appointed to the charge of a corps at Delhi, applied to me to be relieved. There were 15 officers composing the court, and though without the Major there would have been 14, or one above the legal number—as there was no enactment in the army then (nor now) authorising the absence of an officer—and, as certified, sickness, or death, are the only legal causes by which a court can be reduced below their original number, I was compelled to tell him that he could not, legally, be allowed to leave the court,

shall be the *legal* number, if the absence of one or two members be required; urgently, for the public service, such absence should, legally, be allowed: under the same rule as laid down for the navy.

New Members.

1. *Delafons* (57) is of opinion that if there be a new member, the court must proceed with the trial *de novo.* Adye (58) is of the same opinion. *Kennedy* (59) says, that "the remaining members may form part. The court is then constituted in the usual manner *de novo;* but, if the parties consent, it is only requisite to call each witness that has been examined, and after he has been resworn to read over to him the evidence which he has given, in order that the *new* members may be satisfied that it is his testimony, and that they may have an opportunity of putting any questions to the witness that they may think necessary. The parties and the court may also put further questions to each witness, for this proceeding is to all intents and purposes a new trial," and in a *note* (60) observes that on the trial of William Edwards, at Monmouth, before *Baron Wood,* 28th March 1812, a juryman fell down

and thus reduce it to 14 officers. I said that, the absence of one member might effect the verdict two ways. 1. It would reduce the court to 14, that seven might vote the prisoner to be guilty, and seven not guilty, which would be a *legal,* but not a *moral* acquittal; that if he, the Major, remained, he might *acquit;* and, then, the acquittal would be a *moral* acquittal, and leave no doubt. 2. That it would affect the crown, for he might find the prisoner *guilty.* Besides which there was no authority to dispense with the presence of any member except for the two causes above assigned.

There was not any *state necessity* for his leaving the court; the object was *personal;* he lost, by his remaining a member, the command allowance of a corps; that, I said, could never be a sufficient reason. In chapter the 4th, (*Precedents*) it will be seen that on a *revision,* only 13 out of 15 members have been present.

(57) Page 119.

(58) Page 50.

(59) Page 21.

(60) Page 22.

in a fit. The 11 jurymen were again called over, and a 12th was put into the box: the prisoner was desired, if he would, to challenge them; they were all sworn without challenge. the witnesses for the crown were sworn anew; and *by consent* the evidence they had before given was read from the judge's notes; and they were asked whether it was true. The prisoner was convicted. In Easter term following, the point was argued by *Clifford*, prisoner's counsel, before 11 of the 12 judges, on the authorities collected in *Kinlock's case, Foster*, 16; but the judges without hearing the other side, were unanimously of opinion that the conviction was right; and quoted 2 former cases" (61).

2. *McArthur* (62) says, "The addition of new members would under any circumstances be a very dangerous precedent; perhaps absolutely illegal." *Simmons* (63) says, "The members who composed the former court may form part of the new one, but they must, with the additional members, be subject to challenge (64). The whole of the proceedings; the swearing of the court; the swearing, and examination of the witnesses, &c. must be *de novo*." He objects to the mode of proceeding quoted by *Kennedy*, and as confirmed by the judges. I see no objection to the course, the only objections would be that the *manner* of giving the evidence *viva voce* would not be seen, by the new member; and there might have been words uttered which had not been recorded. The objection ought to have more force in the case of a *jury* where *all* must agree. In a *court-martial* where there are 13 or 15 members it has less force; and if the prisoner assents, who else should object?

3. Rule Proposed. That new members may be admitted, if the court be reduced below the legal number; and if both parties consent, the witnesses, having been resworn, their evidence may be read over to them, to whom further questions may be put, (the prisoner having the right to

(61) See Campbell's Reports, vol. iii. p. 207.
(62) Vol. i. p. 236.
(63) Page 173.
(64) There can be no use to re-challenge the *old* members.

challenge the new member,) but if both parties shall not consent, then, the evidence must be given *de novo*. The object is to save time.

MEMBERS SICK LEAVING COURT.

The *Bombay* army rule is (65), that "whenever a member is prevented from attending a court-martial, the cause must be duly certified; and that member cannot again resume his seat." *Captain Simmons* (66) is of the same opinion.

In courts of law, the jury would be discharged and a new jury formed.

RULE PROPOSED. I do not see why there might not be a rule, that if the evidence given in his absence were read to the witnesses (as in the above case as to *new* members) with the consent of both parties, fresh questions being put by both parties, and by the court, if required: provided the witnesses be resworn, and the absence shall not have been for any length of time; and provided the court shall have been reduced below the legal number; and it being inconvenient to the public service to provide a *new* member.

PRESIDENT SICK, &C.

The *Bombay* army regulation (67) is—"If the president of a general court-martial, consisting of more members than the legal number, be from any cause unable to attend the court, a warrant may be issued appointing the next senior member, president; and the trial proceeds without interruption."

McNaghten (68) writing of a president being challenged recommends "that a *blank-warrant* might be taken by the J. A. into court, and upon the president's being objected to, with sufficient cause, filled up *instanter* with the name of the next in seniority."

(65) Article 20. Kennedy, p. 290.
(66) Page 175.
(67) Article 19. Kennedy, p. 290.
(68) Page 107.

Simmons (69) states, "Should the court be deprived of the president, the authority, whence the warrant for his appointment, and the assembly of the court emanated, is competent to appoint the next senior member to that office (not being under the rank of a field officer, or Captain, if a field officer cannot be procured); provided the members still remaining be legally sufficient. In such case, the proceedings would continue as though no interruption had occurred; the warrant of the newly appointed president being read and entered."

Rule Proposed. As in commissions of assize where there are 2 judges named, one for the *crown* side, the other for *civil* cases, there are always one or more king's counsel, or old barristers named, to act in case of the death or illness of one of the judges, so I would recommend that the warrant (if still to be one) should contain the names of the 2 senior members. For the trial of officers there are usually 2, if not 3, field officers. For the trial of N. C. O. and soldiers very often only a field officer, as president; still a Captain would be of sufficient rank, and as there are usually 2 extra members, there can be no difficulty in an arrangement which is conformable to the practice in commissions of assize.

Plea.

Plea of guilty. "In every case in which a prisoner pleads guilty, it is the duty of the court-martial, notwithstanding, to receive and to report in the proceedings such evidence as may afford a full knowledge of the circumstances; it being essential that the facts and particulars should be known to those whose duty it is to report on the case; or who have discretion in carrying the sentence into effect" (70).

Reading the Charges to each Witness.

1. *McNaghten* (1) states, "There is an established practice, which I hesitate not to pronounce a decidedly bad one;

(69) Page 175.
(70) Regns. and Ords. for the Army, p. 246.
(1) Page 185.

one which cannot do good, which often tends to do injury, and which is in direct variance with the better practice of the *civil* courts. I mean the custom *we* have of reading over the charge to every witness as soon as he is sworn, and before the commencement of his examination. To preserve a witness untutored by either of the parties in the cause, is a constant and praiseworthy endeavour of the laws, and the less premeditated his answers can be had, it is in general the better. In *military* indictments, with very few exceptions, are inserted the very words and phrases the utterance of which constitutes the principal offence of the prisoner; which utterance and which exact words it is, therefore, essential for the prosecutor to prove; and in which an alteration of one expression may cause an alteration of the whole sense. By reading the charge therefore, to the witness, the very speeches which he is to swear to, are put into his mouth; and though 3 several witnesses might depose to as many different forms of expression, and of the gestures alleged to have accompanied them, if left to their own remembrance, or idea, of the fact, they are all enabled to preserve a consistency fatal (and perhaps unjustly fatal) to the prisoner, by the practice of informing them of the necessary particulars."

2. *Simmons* (2) states, "The charges against the prisoner are sometimes read to the witness about to deliver his testimony, *before* the administration of the oath, at other times *after*; but the former seems the preferable custom, as by it the matter before the court, touching which the witness expressly swears, is more directly brought to his consideration whilst taking the oath. Should the reading of the charge instruct the witness how to answer, and have the effect of a leading question; as for example, on a trial for disrespect, the prisoner being charged with the utterance of particular expressions and the precise words specified; in such case, the words should be omitted; as the prisoner might reasonably object to their enunciation."

(2) Page 401.

3. *Recent case.* At a trial of A prisoner, at Ghazeepoor, (2nd March, 1838,) charged "with *manslaughter*, (3) in having, at Secrole, (Benares,) feloniously and wilfully killed Gunner Miles Neille, of the same Company, by throwing him down with force upon the ground, and falling upon him, on the 12th of February, 1838; by which his bladder was ruptured: whereof the said Neille died on the 16th February, 1838." The court asked me to read the charge to each witness. I requested to have the court cleared and recorded the following *Minute* that—"It is not the practice of courts-martial to do so, which I can state from references I have made in the J. A. General's office (Calcutta). At *Regtl.* courts-martial, I believe, it is usual. At *Genl.* courts-martial, in cases of this nature *(manslaughter)*, I am of opinion, the charge should not be read; as tending to put words into the mouth of the witness." The *court* decided that the charge should be read to each witness; "which was done accordingly."

4. *Order thereon by Commander-in-Chief.* "Disapproved, (4) I disapprove the proceedings of this court-martial: 2ndly. Because the court overruled the opinion offered to them by the D. J. A. G., on the point of reading the charges to every witness, previous to his examination. The reason, why it is preferable to abstain from that proceeding, appears to have been properly stated by the D. J. A. G. namely, that the practice may frequently operate (as a leading question would do) to guide the answer of a dishonest witness. No rule is laid down by authority on this point: but in the absence of a rule, *analogy* is the safest guide. In courts of *civil law*, the indictment is not read to a witness. I desire, that the officers who composed this court-martial will re-peruse the 6th paragraph of the G. O. of the 25th July, 1836 (5)."

(3) G. O. C. C. 20th March, 1838.

(4) H. Fane, General Commander-in-Chief, East Indies.

(5) "He *(Sir H. Fane)* desires also, that Major C. and any other officer who is hereafter placed in the position of a *President* of a court-

5. *Practice in former times.* "The J. A. G. *(Calcraft)* on being desired by a member to read the charges to the witnesses, states, "that it is customary when the *interrogatories* were *general,* but a useless repetition when the question was to a particular fact. The J. A. submits (in all humility) he is responsible for the conduct of the prosecution; and a competent judge when it is expedient to do so. The *court* (cleared) decided the whole of the charges ought to be

martial, will recollect, that there are authorities in every military division, whose duty it is to remove any doubts which may arise relative to the construction of a section of the Mutiny Act, or an article of War; and that when any doubtful point arises, it is preferable to refer that point to the officer who is responsible for the decision he gives, rather than to trust to *any member of the court-martial, however high an opinion may be entertained of his judgment, or knowledge.*" (District court-martial on a Private soldier, H. M.'s 13th Light Infantry, Kurnaul.) The Englishman (newspaper) 6th April, 1838, p. 661, observes—" The Commander-in-Chief has distinctly expressed his concurrence in the J. A.'s opinion, and has thus virtually abolished a most ill-judged procedure. The court were not *wrong* in having overruled the J. A. in respect to the point of *processory form;* because the whole custom of courts-martial was on the side of the *practice,* and so thoroughly established had it come to be considered, even by our standard writers upon Military Law, that as far as we can at this moment recollect, the only or rather the first author who formally and argumentatively objected to the practice, was *Capt. McNaghten* in his annotations on the Mutiny Act: some dozen years since. *Sir H. Fane,* we deferentially think, was wrong, then, in making the court's decision *a* ground of his disapproval; for had the verdict in all other respects been right, he certainly could not have legally quashed it on *that* plea only. If he had done so, he would have, in principle, *ipso facto* vitiated probably all his former confirmations even in life and death; for it cannot be doubted by any one conversant with the practice of courts-martial, that the selfsame course must have been almost invariably pursued, whether H. E. always knew of that or not. It was not even a just ground for censuring the court, who were certainly not bound to alter a long established and universally recognized form of procedure, on the mere opinion of any Judge Advocate that it ought to be abolished; especially where that opinion was so narrowly grounded as only to be supported by a supposition (which the court might not consider a just one), that there were *dishonest* witnesses to be called on that particular trial."

It will be seen above that *I* did not use the words "*dishonest* witnesses."

read. The *J. A.* enters his dissent; but acquiesces in the present instance (6)."

6. *Doubts by court as to practice.* When a court doubted as to the *legality* of not reading the charges. The *J. A.* said "by no means necessary, and tends to lead a witness's evidence;" the omission is not illegal—not the practice in *civil* (criminal) courts—quotes *Hough* (1825) p. 930 as "not being necessary." The court refer to it and then to *Kennedy's* work. Kennedy does not mention the point. *Court* agree with J. A. (7).

7. *Col. Kennedy* (8) states, "It *has* been *usual* at courts-martial to read over the charge or charges to each witness before his examination was commenced. But as the charge is in general so worded as to suggest the *very evidence* which the witness is called to give, such a mode of refreshing his memory is obviously highly objectionable. It is also, contrary to the practice of courts of law." The Colonel in his *former* work (9) merely quotes the practice; without the objection to it. On the trial of Private Simon Quilty, H. M.'s 31st Regt. (10), a member wished the charge to be read and quoted the Colonel's former work; the court was cleared and I made a *Minute*, as follows: "I conceive the doing so very objectionable, inasmuch as it must, very often, put words into the mouth of a witness; and, at times, cause him to repeat even expressions made use of by other witnesses. The practice does not prevail in courts of law, and there seems no good reason why the time of a court should be taken up by the adoption of a needless mode of procedure. I trust, however, that H. E. the Commander-in-Chief will decide this point,

(6) General court-martial on Capt. Griffin, H. M.'s 14th Foot, Fort William, 14th December, 1809. G. O. H. G. 6th August, 1810.

(7) Pages 15 and 16, Trial of Private Power, 31st Foot, Meerut 8th Oct. 1829, G. O. C. C. 2nd Nov. 1829. Capt. Birch, D. J. A. G.

(8) Page 192, *note.*

(9) 1824, p. 33.

(10) Dinapoor, 5th April, 1837, never published. He committed suicide.

to prevent any future discussion regarding the question agitated." The court, however, decided against me.

8. *Writers for and against the practice.* McNaghten, Simmons, (not always,) Calcraft, (not always,) and Kennedy are in favor of its being the practice. Sullivan, Delafons, Adye, Author of Military Law of England, McArthur, Tytler, Sir C. Morgan, do not notice the point. Captain Birch is of opinion that it is not necessary; so that the *onus* lies with McNaghten and Simmons; and not *one* is for its adoption in *all* cases. I am of opinion that it is not the practice at *Genl.* courts-martial; I have searched the proceedings in the J. A. G.'s office, Calcutta, for the last 45 years, and find only the four cases quoted wherein the point has been raised, in three of which it was decided by the *court against* the *J. A.* It is true, it may not always be recorded "*charges read;*" but during a considerable practice as J. A. during more than 12 years, I never made a practice of reading them; I know that Capt. Birch, whose practice has also been considerable, during more than 10 years, never reads them; nor have I observed it to be done by other J. A. Captain Simmons has never, I believe, been a J. A. Captain McNaghten was for 3½ years.

9. Rule Proposed. That it is not unusual at *Regtl.* courts-martial to read the charge to each witness; that it is not the practice at *Genl.* courts-martial; that the indictment is not read at trials in courts of law, and as where the law-military is silent, military courts refer for precedents to the law of England; it is expedient not to read the charges at military courts; as tending to instruct a witness in the evidence he is to give; to put into his mind facts he never *before* heard of, and of which he often can have no knowledge. That an abstract of a charge may be read, as was done at *Lieut. Genl. Whitelocke's* trial, (11) "*the abstract of the first and second charges was read;*" the J. A. giving the witness a paper containing points on which evidence is to be given.

Questions to Witnesses in Writing.

Where, as in the case of *expeditions*, a *narrative* is to be given, a written paper is given to the witnesses. At *Lieut.*

(11) Printed Trial, p. 258.

General Whitelocke's trial (12) the J. A. G. said—" I have followed the same course, with respect to *Sir S. Achmuty,* which I have *before* pursued in regard to the other general officers examined with respect to this expedition; by putting into his hand a paper, which I will read: " *Sir S. Achmuty* is requested to begin his narrative from the time he came under *Lieut. Genl. Whitelocke's* command, to continue it up to the night of the 4th of July; to state the circumstances of the particular corps under his order, its state of equipment for service; to describe the difficulties experienced by the corps under his command during the march with the main body of the army; to pursue his narrative through the different days' marches; stating the appearance of the face of the country, and difficulties, if any, which presented themselves; whether any circumstances of hostility presented themselves, either from a regular force, or the armed peasantry; whether any prisoners were taken; what information was received of the preparations and state of defence of the enemy; what reconnoitering parties were formed; why the passage of the bridge was not attempted; the circumstances of the passage of the river by the ford; the attack and defeat of the enemy on the 2nd July; to relate all the occurrences of the 3rd and 4th of July, particularizing whether any and what preparations were made by bringing up artillery, &c.; what communication was formed between the different divisions of the army; what intelligence was received from the prisoners who were taken: and to state generally the efficiency of troops composing the main body of the army."

Application to put off Trial.

1. *Kennedy* (12) *states,* " It is also at this stage of the proceedings that the prosecutor or prisoner should state their reasons to the court in case they wish the trial to be delayed. For, according to the practice of Courts of Law, all motions for such delay must be made previous to the swearing in of the jury and entering into the trial. At

(12) Page 35.

courts-martial, however, it is first necessary to administer the oath to the *(President and)* " members in order to invest them with the character of judges, and it seems also requisite that they should be previously acquainted with the nature of the subject which is to be investigated, in order to enable them to appreciate correctly the reasons for staying the proceedings which may be assigned. But every such motion ought in strict regularity to be made *before* the prisoner is arraigned and the prosecution is entered into. Yet there are various instances of courts-martial having adjourned *after* the trial had commenced, on application from the prosecutor in consequence of the absence of a material witness. Such an adjournment may, in many cases, conduce to the proper investigation of the charge."

2. *Simmons* (13) states, " Application to delay the *assembling* of the court, from the absence or indisposition of witnesses, the illness of the parties, or other cause, should be made, when practicable, to the authority convening the court; but application to *put off* or suspend the trial, may be urged with a court-martial, subsequent to the swearing of the members. It may be supported by *affidavit* (14), and to prevail, on the score of the absence of the witness, the court must be satisfied that the testimony proposed to be offered, is material, and that the applicant cannot have substantial justice without. The points therefore, which each witness is intended to prove, must be set forth in the application, and it must also be shown that the absence of the witness is not attributable to any neglect of the applicant. A precise period of delay must be prayed for, and it must be made to appear that there is reasonable expectation of procuring the attendance of the witness at the stated time, or, if the absence of a witness be attributed to his

(13) Page 185.

(14) So in Courts of Law; but a letter would be sufficient in most cases, and should be recorded on the proceedings. An affidavit might be ordered to be made before a magistrate if at a distant station; or before the commanding officer of the station, or before the J. A.

illness, a surgeon, by *viva voce* testimony, or by affidavit (15), must state the inability of the witness to attend the court, the nature of his disease, and the time which will probably elapse before the witness may be able to give his testimony.

3. *When denied Prosecutor after Trial begun.* On the trial of *Col. Quintin* (16), on the second day, the prosecutor, *Col. Palmer*, wished the court to adjourn owing to the absence of a witness in France. The *J. A. G. (Sutton)* replied, "I do not know of any instance of the court being adjourned to an indefinite period, for the attendance of a witness, whose attendance they could not compel. Another circumstance is, that it is a *witness* on the part of the *prosecution;* and that this prosecution, as all military prosecutions are, is in the name of the crown; and I take it not only on *precedent*, but in common justice, a greater latitude has always been given in the procuring witnesses material for the *defence*, than those thought material for the *prosecution*." (See also, McArthur, vol. 2, p. 375—same opinion). The reason for which is that the prosecutor *(Crown)* can fix their own time.

4. *If delay, report to J. A. G.* In the *Bengal* army (17) the J. A. "to report, weekly, on the trial of European or native commissioned officers—in a few words, the progress of proceedings. To begin a week before the court is expected to assemble. If extraordinary *delay* in arrival of parties or witnesses, or other circumstances occasioning a *postponement*, to be reported."

Witnesses examined separately.

The writers on Military Law all agree that the witnesses should be examined separately (18), *Adye* adds, "and either of the parties may insist on the rest of the witnesses being

(15) A medical certificate is the practice.
(16) Page 35.
(17) Lr. J. A. G. No. 504, 26th Sept. 1835.
(18) Sullivan, 36. Adye, 180. Tytler, 248. Kennedy, 107. Simmons, 186, 410.

out of court, while any one is under examination; however, it sometimes becomes necessary to confront adverse witnesses, who diametrically and absolutely contradict one another, in their relation of the same fact or facts." And *Simmons* observes, (19) "when a prisoner had, with the consent of a brother officer, whose name was on the list of witnesses, solicited the court to permit his assistance during the trial, the request was denied, and the court, in its remarks subjoined to the sentence, animadverted on the request, observing as to the conduct of the officer authorizing the prisoner to solicit his assistance." It is usual to give notice, and on *Lieut. General Whitelocke's* trial (20) it is stated, "all persons who were summoned to give evidence, were desired by the president to withdraw." It is always done in *civil* courts, on the application of counsel; but it is not considered a *right*.

RULE PROPOSED. That all witnesses be directed to withdraw during the examination of the witness giving evidence, except it be necessary to confront any witness or witnesses.

EVIDENCE AT FORMER TRIAL.

"The evidence of a witness upon the former trial may be proved either by the judge's notes, or on oath, by the notes or recollection of any person who heard it" (21).

EXAMINATION OF WITNESSES NOT BY DEPUTATION.

If it be necessary to examine any witness who is prevented attending by sickness, the whole court must adjourn to the witness' house, or to the hospital, or place where he may be. *All* the writers on Military Law agree on this point (22). *Sullivan* observes that "H. M. annulled the proceedings of one court-martial, for having appointed six of

(19) Page 410.
(20) Printed Trial, p. 2.
(21) Starkie, vol. iii. Appendix, part ii. sect. cvii. 278.
(22) Sullivan, 32. Delafons, 228. Adye, 178. Mily. Law, 110. Kennedy, 290. Simmons, 400.

their members to take the evidence of a valetudinary witness." All evidence must be taken in the presence, and hearing of the *whole jury*; so by analogy, must the president and all the members of a court-martial be present when any evidence is given; and whenever a member leaves the court room, with the president's permission, the J. A. &c. ceases to record any evidence, during his absence.

Other Witnesses called by Court.

1. *Delafons* says, (23) "It is presumed that a court-martial (acting both as judge and jury) cannot exceed the limits prescribed to the Attorney General or King's Solicitor." "Neither the jury, or the judges, have a power (from any circumstances relative to the cause to be tried, that might come within their own knowledge in the capacity of private individuals) to direct any person to be summoned to give evidence, who has not been regularly subpœnaed either on the part of the prosecution or the defendant." *Kennedy* (24) says, "If it appears from the depositions of the witnesses examined, that some part of the evidence wanted further elucidation or proof; and that a person, mentioned in the depositions as capable of affording the information required, is in attendance, or immediately procurable, the *court may*, undoubtedly, call such person as a witness, although he has not been examined by either of the parties. The court, also, may at any stage of the trial call back, either of its own motion or on the suggestion of either party, for the purpose of further examining him, any witness who has been previously examined."

2. *Simmons* (25) gives the same opinion as *Kennedy*, but adds—"But it is apprehended that this is the utmost extent to which a court would be authorized to go. A court-martial might involve itself in an inextricable labyrinth, were it to stay proceedings and adjourn in order to obtain testimony. Much less would a court-martial be justified (should it appear that the testimony produced by the prosecutor was

(23) Page 239. (24) Page 121. (25) Page 413.

insufficient or inconclusive), in receiving evidence, in support of the prosecution, after the prisoner had been placed on his defence."

3. *Archbold* (26) states—"It must be observed, however, that it is no objection that witnesses are called and examined at the trial, whose names are not on the back of the indictment." It is clear that *Delafons* is wrong, and that it is in the power of the court to call a fresh witness. Suppose A and B are witnesses for the prosecution, and A and B said they were not present when the quarrel first began which occasioned the murder of E, but that C and D were; surely, the court ought to call C and D.

4. Rule Proposed. That it is competent to a court-martial to call fresh witnesses. And I have known it done often.

Private Conversation.

It has often been objected by witnesses, at *Genl. courts-martial*, in answer to a question, that it was told them in confidence, or in private society. *Phillips* (27) states, "If a friend" said the Chief Justice *(Lord Kenyon)*, "could not reveal what was imparted to him in *confidence*, what is to become of many cases, even affecting life, for instance, Dr. Ratcliff's case. And if the privilege, now claimed, extended to all cases and persons, *Lord W. Russel* died by the hands of an assassin, and not by the hands of the law; for his friend *Lord Howard* was permitted to give evidence of confidential conversations between them." And, he observes, (28) that a bill of indemnity was passed "to indemnify witnesses from criminal prosecutions and from civil process, to which they might be exposed by giving evidence on *Lord Melville's* trial. Four judges were of opinion, that a witness was not compellable to answer any question, the answer to which might subject him to a *civil action*; the other judges,

(26) Criminal Pleading, p. 33.
(27) Law of Evidence, vol. i. 135.
(28) Vol. i. p. 263, *note*.

together with the Lord Chancellor, and Lord Eldon, were of the contrary opinion."

Evidence struck out.

Some military men are of opinion that evidence cannot, legally, be struck out of the proceedings. *Phillips* (29) states, "In the *Berkeley Peerage case,* the Lord Chancellor said with respect to the answer to the question, it might be the subject of future consideration, *whether it ought to stand upon the minutes as evidence.* The question respecting the former representations of *Lady B.* was therefore repeated by one of the Lords, and the answer entered among the minutes, *subject to future revision.*" And in the trial of *Watson,* for high treason (30) *Mr. Wetherell* said, "In consequence of what has passed, I shall take the liberty of submitting to your Lordship, whether we have not a *right* to have the evidence of *Mr. Heyward struck out.*" So I think there can be no doubt that courts-martial may expunge evidence—using a sound discretion—either of their own accord, or at the request of either party; but if either party object; I think the objection should be recorded; and a minute should be made; the J. A. retaining the evidence expunged.

Prisoner feigning Insanity.

A soldier named *Patrick Murray,* H. M.'s 31st Foot, tried, at Dinapoor, on 2nd Nov. 1837, (31) "for having grossly abused two serjeants, when in the execution of their duty; and for striking an assistant surgeon of the regiment and a serjeant in the execution of their duty; and two privates; and for outrageous and abusive language towards a Regtl. court of inquiry (32). He struck one of the sentries in court at

(29) Law of Evidence, vol. i. p. 292, *note.*

(30) State Trials, vol. xxxii. p. 496.

(31) G. O. C. C. 18th (K. T. 17) Nov. 1837.

(32) The prisoner took a seat in the court, and acted very improperly. Before the court-martial, he said his name was not "Patrick Murray," and that he was "a gentleman, &c." and wished to be tried by his peers, &c.

the Genl. court-martial, and grossly abused the court, and J. A. He said the court "were a set of perjured villains, &c." The court doubted the prisoner's sanity. I requested the court to be cleared, and recommended that the surgeon and the other assistant surgeon of the regiment should be present during the examination of the witnesses. The court adjourned, for a short time, and I summoned the above medical officers. On their arrival, I requested them to *watch* the prisoner's behaviour. He became less talkative, and declined to say any thing to the purpose in his defence. The medical gentlemen were sworn, and examined as to whether the prisoner had ever been in hospital and for what complaint; what their opinion was, as to the state of the prisoner's mind; and if any thing they had heard, or seen, induced them to think he was deranged; and if any thing they had observed in court induced them to change their opinion. They both declared their belief that he was feigning insanity. He was sentenced to be transported for life, which sentence was approved. Had there been any doubt, there would have been a medical committee, specially appointed.

Minute by Judge Advocate.

1. *Sullivan* says, (33) "should illegal measures be pursued in opposition to his opinion; and which exonerating him, throws the burthen of the act upon the tenacity of those who may carry it into execution. In such a predicament, (and it is no uncommon one) he should *protest*, not stop the proceedings of the court, but enter his *objections*, and, with reverence, submit them to the consideration of his sovereign, or to the delegates of his power." The *Military Law of England* (34) quotes both *Sullivan* and *Tytler*. Tytler (35) states, "though not warranted to enter his *dissent* in the form of a *protest* upon the record of the proceedings, (for that implies a *judicative* voice,) (36) ought to engross

(33) Page 92.
(34) Page 141.
(35) Page 354.
(36) Neither the president or members, singly, can enter a minute.

therein the *opinion* delivered by him upon the controverted point; in order not only that he may stand absolved from all imputation of failure in his duty of giving counsel; but that the error or wrong may be fairly brought under the consideration of that power with whom it lies, in the last resort, either to approve and order into effect, or to remit, the operation of the sentence." *Kennedy* (37) agrees with *Tytler.*

2. *Simmons* (38) differs from all the rest. He says, "but in opposition to the opinion of *Mr. Tytler,* it is believed that, should the court decline acting on his *advice,* the custom of the service will not only *prohibit* a record of the *J. A.'s dissent* in form, but that it will *exclude it in any shape;* and that he will not, as a matter of *right,* be permitted to engross, on the face of the proceedings, any opinion, either on a controverted point or otherwise, which, at any period when the court is closed, he may think it his duty to offer. The record is confined to the proceedings of the court; it is not *usual,* nor would it be *right,* to detail the grounds which might have led the court to the result finally adopted. The decision only of the *court,* both as to interlocutory and final judgments, is made known; but in no case the judgment of *individuals.*"

3. The word "*protest*" as used by *Sullivan,* is not correct. *Simmons* differs from all the others in opinion as to the *right* of the J. A. to *dissent* in form," or to "engross his *opinion.*" I never knew it objected to, and no one but *Capt. S.* entertains the opinion. If we judge, by analogy, we shall find that a judge will always take a note of objection raised by the counsel for the crown, if he did not, on a motion for a *new trial,* the court above could not obtain the exact grounds on which the application was made. It is for the information of the superior authority that the *minute of opinion* is made; and without it the confirming authority would not know upon what grounds the court took a different opinion; and it is, also, right that such authority should know whether the erroneous verdict, or sentence, &c. was the

(37) Page 194. (38) Page 242.

result of the want of knowledge in the J. A. *Simmons* adds, "As well may an individual member (39) claim a right of protesting as the J. A., and on much more plausible grounds; the members of a court-martial being individually amenable to a superior court of justice, for the sentence which the court may record: whereas the J. A., having no deliberative opinion, is not, in any case, *legally* responsible." I suspect that no court will ever refuse to admit the *right*: but they may object to the style and language of the *minute*.

4. Rule Proposed. That a J. A. is not only, by the custom of the service, entitled to record a minute of his opinion on the proceedings; but it is, in many cases, proper that he should do so.

Hours of Sitting.

The hours of sitting at all *Military* courts-martial are, from 8 in the morning to 4 in the afternoon; and in the *East Indies* from 6 in the morning to 4 in the afternoon: except in cases requiring an *immediate example*. In the *Navy* there are no prescribed hours for sitting (40).

Judge Advocate may be relieved during the Trial.

Simmons (41) says—"The reasons which debar the return of a member, absent during the reception of evidence, do not apply to the Judge Advocate; he may resume his duties at any moment." On a trial in Fort William, the J. A. G. being sick, another officer was appointed to act (42); and other instances may be quoted.

All Charges must be Discussed.

1. Where a General court-martial had only investigated 7 out of 14 charges, and cashiered the officer, and recorded

(39) To do so, would be contrary to his oath.

(40) McArthur, vol. i. p. 227, vol. ii. p. 14, *note* †.

(41) Page 177.

(42) J. A. G. (Calcraft) sick—Major T. M. Weguelin, trial of Capt. Griffin, 14th Foot, 14th December, 1809. G. O. H. G. 6th August, 1810.

their opinion "and beg leave to submit to H. M., whether their determination and sentence may not satisfy the purposes of public justice; and whether H. M. may in his wisdom think it necessary to direct that the court should fully execute H. M.'s commands, by investigating the remainder of the charges which have been preferred against Col. C. Report having been made to H. M. of the foregoing sentence and minute, by the J. A. G., the court-martial was, re-convened by H. M.'s command and proceeded, during several subsequent days, in the investigation of the remaining articles of charge; and after hearing evidence touching the same, as well on the part of the prosecutor as of the defendant, delivered their opinion on each article of charge respectively, and made their final adjudication upon the whole" (43).

2. The 16th clause of the Mutiny Act and G. O. C. C. *(Bengal)* 1st June, 1815, and the Bombay Mily. Code (44) direct no fresh evidence to be taken on a *revision.* I have before proposed (45) to add these words to clause 16: "*Provided evidence shall have been taken on all the charges.*" Adverting to the above case, I think in a similar instance, that if a court shall have omitted to take evidence on any charge, the court might still take evidence. For on the charges on which no evidence has been taken, the clause cannot apply. The words "and that no *finding, opinion* or *sentence* given by any court-martial and signed by the president thereof, shall be liable to be revised more than once, *and no witness shall be examined, nor shall any additional evidence be received by the court on such revision,*" relate to charges upon which *evidence has been,* already, taken and "a finding, opinion, or sentence given." If there be no *evidence* taken, no *sentence* can be passed. And if even it were admitted, that on a *revision,* evidence could not be taken; still the charges could be, legally, sent before the same, or before

(43) Col. Cawthorne's trial, 1795. James's Decisions, p. 17. See also *Tytler,* p. 144.

(44) Code of Mily. Regns. sect. xx. 85. Kennedy, p. 305.

(45) Improved Articles of War, (1836,) p. 17.

another court-martial; since this would not amount to "no officer, &c. liable to be tried a *second time* by the same or any other court-martial for the *same offence*," for no trial has taken place as regards such charges; and the president and members would be liable to trial themselves for "disobedience of orders."

Proceedings of Court Inquiry not given to Person tried.

1. *Simmons* (46) says, "It has been decided that the minutes of evidence, taken in writing before the privy council, and the proceedings of a military court of inquiry, cannot be called for without the consent of the law officers of the crown (47). It may, therefore, be presumed, that on ordinary trials by courts-martial, the minutes of courts of inquiry cannot be called for without the consent of the superior military authority which convened the court of inquiry."

2. At a general court-martial held at Nusseerabad, 8th Oct. 1835, on a gunner, the prisoner, in his written defence, wished the production of the proceedings of the court of inquiry; court closed and unanimously decided that they shall be laid before the court: the Acting D. J. A. G. laid them before the court. "The prisoner desired them to be read. The court was closed to consider whether the president of the court of inquiry shall be called to give evidence of what was said by the witnesses B. and H. at the court of inquiry, for the prosecution. It is decided in the affirmative" (48).

(46) Page 418.

(47) Home *v* Lord F. Bentinck, Exchequer Chamber, 17th June, 1820. Lord B. had been president of a court of inquiry on Lt.-Col. Home, who brought his action against his Lordship for a *libel* contained in the *report* made by the court of inquiry. M. G. Sir H. Torrens, was (as Secy. to the Com.-in-Chief) subpœnaed to produce the proceedings, to compel which a writ of error was brought. *Verdict* for defendant—*Plaintiff* entered his bill of exceptions, and brought his writ of error. The judges confirmed the verdict for defendant, (Hough, P. C. M. 1825,) pp. 434—7.

(48) The court also called one of the members of the court of inquiry,

3. *J. A. refused the proceedings of court inquiry.* Where a J. Advocate was denied by the court at the prisoner's application, (declaring that he was told he might safely make any statement without risk before the court of inquiry,— President and members of the court of inquiry, confirming prisoner's statement,) reference to the court of inquiry, he recorded, "I must make some alterations in the mode of conducting the prosecution; and request the court to *adjourn* till to-morrow." The proceedings appear to have been produced; but rejected by court as evidence (49).

The Court may interfere with Defence.

1. *McNaghten* (50) says, "In point of both *law* and *reason*, it must be admitted that over a prisoner's evidence, the court has, to the full, as much power as over that of the prosecutor, and can reject the witnesses of one, as well as of another; or any part of such witness's testimony; and that, in a word, the rules of evidence apply in every case, and with great strictness, and ought to be as scrupulously enforced, in the instance of one party as in the instance of another." *Kennedy* (51) says, "Many officers entertain an opinion that a court-martial cannot interfere in any manner in a prisoner's defence, and that he is at liberty to conduct it in whatever way he chooses. But this opinion is entirely erroneous, and seems to have originated from no distinction being made between the prisoner's address to the court (which is usually called his defence) and the evidence which he adduces in justification of his conduct. In the *first* it would seem that a *court of law* seldom or never inter-

p. 20 of proceedings, to prove discrepancy in the evidence of the witnesses. The crime was an unnatural one; and the object was to prove that the witnesses for the prosecution gave false evidence as to the place, &c. The member of the court of inquiry had examined the spot himself: (acquitted,) never published in G. O.

(49) Trial of Lieut. Steele, 25th L. D. Bangalore, 17th Aug. 1810.

(50) Page 208.

(51) Page 73.

feres (52) but the *latter* is completely subject to the control of the court. *It is the court alone who are the judges what evidence shall be admitted or rejected; and neither the prosecutor nor the prisoner can insist* on the admission or rejection of any contrary to their opinion; far less can they *protest* against such a decision. But the prosecutor or prisoner may state their reasons for offering and also their objections against the receiving of any particular evidence; and if the court are of a contrary opinion may request that these reasons or objections may be recorded on the proceedings; and with this request the court in general complies."

2. *Simmons* (53) says, "The utmost liberty, consistent with the interest of parties not before the court, and with the respect due to the court itself, should, at all times, be allowed a prisoner. As he has an undoubted right to impeach, by evidence, the character of the witnesses brought against him; so is he justified in contrasting and remarking on their testimony, and on the motives by which they or the prosecutor may appear to have been influenced. *All coarse and insulting language* is, however, to be avoided; nor ought invective ever to be indulged in: the most pointed defence may be couched in the most refined language. The court will prevent a prisoner from adverting to parties not before the court, or only alluded to in evidence; further than may be actually necessary to his own exculpation."

3. Where an officer in his defence, advanced deeply disgraceful imputations against his superior officer, Brigr. V.;

(52) Mr. (afterwards Lord) Erskine on the prosecution of Captain Baillie, Lt. Governor, for a libel on certain officers of Greenwich Hospital, as Counsel for Capt. B. said, "Indeed, *Lord Sandwich* has, in my mind, acted such a part * * * * *. (*Here Lord Mansfield observing the Counsel heated with his subject and growing personal on the first lord of the admiralty, told him, that Lord Sandwich was not before the Court.*") The words in *asterisks* are in the first volume of *Lord E's* speeches, and were so strong (though I do not recollect them) that Lord M. threatened to *commit* him; on which Mr. E. said he never would hold his tongue while an advocate for a British subject, and told his Lordship he might commit him if he liked, &c. State. Trial, vol. 21, p. 43.

(53) Page 195.

the latter not having been either prosecutor or witness in *the cause, and the matter slanderously alleged against him, being utterly unconnected with any question before the* court; he was tried upon a separate charge, for "scandalous and infamous behaviour, unbecoming the character of an officer and a gentleman and subversive of military subordination" (54).

DEFENCE READ BY COUNSEL.

1. *Simmons* (55) says, "Courts-martial are particularly guarded in adhering to the custom which obtains, of resisting every attempt on the part of counsel to address them; a lawyer is not recognized by a court-martial, though his presence is tolerated as a friend of the prisoner, to assist him by advice in preparing questions for witnesses, in taking notes and shaping his defence. On the trial of *Lieut. Genl. Whitelocke,* the counsel was not permitted to read the defence; as being contrary to precedent; but the General was informed that any military friend or any near connexion who did not attend to assist him professionally, might read it for him" (56).

2. *Modern practice.* Certainly, counsel are not to address the court, but there are many instances in favor of its practice at the present day—*Whitelocke's* trial took place 30 years ago—On Captain *Burslem's* trial, Limerick, August, 1835, the defence was read by a solicitor, (Mr. Monsell) (57). In the case of *Captain Leyton,* Royal Marines, at Woolwich, the defence was read by a barrister (58). On the trial of Captain (now Bt. Major) *B. Blake,* 47th Bengal Native Infantry, he was attended by professional gentlemen, T. Dickens, Esq. Barrister, and Mr. Strettell (59).

(54) Hough, P. C. M. (1825) p. 523. G. O. C. C. 4th Sept. 1821. Sentenced *to be discharged the service.*

(55) Page 196.

(56) Printed Trial, p. 763. Genl. Whitelocke read part himself; Mr. Sewell, Mr. Lewis and Brig. Genl. Meade, other parts.

(57) Meerut Observer, 31st March, 1836.

(58) Naval and Mily. Gazette, 27th Feb. 1836.

(59) G. O. C. C. 1st Dec. 1832.

3. Capt. B. (60) requested that his professional adviser *Mr. Dickens* might read his defence. "That his professional adviser is an officer in the receipt of *half-pay* in H. M.'s service, and without doubt, as such, subject to the jurisdiction of, and responsible to, this court, if any thing were done by him which was judged improper. Formerly, in the case of *Genl.* Ross, in 1785, it was held that *half-pay* officers were not liable to courts-martial; but a change in the language of the mutiny act, has since taken place; and it is, now, the prevailing opinion that *half-pay* officers committing military offences are so liable, and can undoubtedly be dismissed by H. M., without a court-martial; and Capt. Blake begs *Mr. Dickens* may be permitted to read his defence." *Reply*—"The court are of opinion that *Mr. Dickens* cannot be allowed to read *Captain Blake's* defence; but any military friend of Captian B.'s may do so."

4. I see no objection to counsel reading the defence which he has most likely written. The only objection would be, if counsel (or any one else) wrote a violent or intemperate defence, or introduced any words, which were not in the defence, calculated to excite the feelings, or give an erroneous impression regarding the evidence, or the facts of the case. Indeed if any written defence contains matter inconsistent with the evidence, the J. A. or the court, should stop the reading of such part, and mark the page containing such passage; but why, merely, because 30 years ago it was thought improper, I cannot see the reason why we should *now*, not allow of a practice, that cannot, if under restrictions, cause any inconvenience. I admit that neither counsel nor friend should *address* or *speak* to the court, which might lead to arguments, but, having written a defence, proper in language, I do not see the reasonableness of preventing counsel from reading what he has written. And I have shewn, above, two cases, in 1836, in Ireland and in England, in which courts-martial allowed, a *solicitor* and a *barrister* to read defences.

(60) Page of Trial, 392—5.

EVIDENCE IN WITNESS'S WORDS.

"All evidence to be recorded, as nearly as possible, in the words of the witness, in the order in which it is received by the court" (61). That is, the words of the witness are not to be changed, in such a manner as to give a different sense to them, nor should the order in which it is given be changed; but to record, at all times, barrack phraseology, is not expected. Nor, is a court bound to record all that the witness states, which, though it may relate to the transaction, does not apply to the charge as now worded. But if either party wish any particular words to be taken down, it is usual to record them.

ADDRESS TO COURT BY EITHER PARTY TO BE IN WRITING.

Where there is the least probability of high words being addressed by the parties before the court to each other, it is advisable to direct any address to the court to be in writing. The court decided in one case (62), at the recommendation of the J. A. "that neither party should address the court, except in writing: and that neither party interrupt each other, beyond the mere act of stopping him when occasion arises; that they will address whatever observations they may have to make to the court in writing, and not verbally." In another case (63) the court desired the prosecutor not to address the court without leave of the president.

FALSEHOOD IF CHARGED MUST BE PROVED BY PROSECUTOR.

1. The *onus probandi* in all accusations lies with the accuser. No man is a liar because he is called so. If A. accuses B. of having told a falsehood, A. must prove it. The following case will illustrate this position—"I charge Capt. R. A. McNaghten, of the 61st Regt. N. I., with scandalous conduct, in having, in a note to the address of Capt. E. C. Windus, H. M.'s 11th L. D., dated 29th April, 1835, made the following assertion; *viz.* 'As we,' (meaning Capt. Mc-

(61) Regns. and Ors. for the army, p. 246.

(62) G. O. C. C. 23rd Oct. 1835.

(63) Page 315, G. O. C. C. 25th Oct. 1834. The proceedings embraced 1250 pages folio.

'Naghten and Capt. Monke) 'know that he' (meaning Lieut. Low, when a witness on the trial of Lieut. Wallace, 39th Regt. N. I.) 'has sworn to what is *not the truth;*' *such assertion* being *false* and unwarrantable, and tending to destroy my character as an officer and a gentleman." (Signed J. H. Low, Lieut.) (64).

2. The prosecutor, after giving in the above original note (which Capt. McN. acknowledged to be in his hand-writing and sent by him) said he would close the prosecution, thinking he could compel Capt M. to make his defence. Capt. M. said he had no defence to make, as there was no proof of the words "such assertion (that contained in the note) being *false and unwarrantable.*" The court told Lieut. L. there was no evidence as to the point, "*false,* &c." and adjourned till next day, when the prosecutor produced his witnesses: for since the note accused the prosecutor of having given *false* evidence, his own oath could not decide the question.

3. The prosecutor was advised to give in the whole of his own evidence on Lieut. W.'s trial, out of which the above assertion by Capt. M. arose, and to call witnesses to prove the facts stated in his evidence. Capt. M.'s note attacked Lieut. L.'s evidence, generally; but as three points in particular, had been insisted on by Capt. M., Lieut. L. was advised to give evidence to such an extent, to put Capt. M. on his defence; and if he urged any *new point* it would be open to Lieut. L. to adduce evidence thereon.

4. Capt. M. in his defence said, with regard to the words "*false and unwarrantable,*" that, as he conceived that three other witnesses, at the same trial, contradicted Lieut. L., whether the evidence of Lieut. L. was true or false, he was warranted, and that it depended on the weight or credit due to the testimony of the said three other witnesses, and, by consent of the prosecutor, Capt. M. gave in a copy of their evidence, which the J. A. compared with the original minutes furnished by the J. A. from his office, at Meerut. This

(64) G. O. C. C. 19th Oct. 1835.

closed the case; and a reply was refused. The court were of opinion that Capt. M. was "not guilty of the charge, except of writing the note set forth in the charge and to which they attach no criminality; the court do therefore fully and honorably acquit Capt. M. of the same accordingly."

5. The case of Captain J. R. Raines, 77th Regt. tried by a court-martial, at Mullingar, 15th June, 1836, re-assembled on 21st July, 1836, when on a *revision* the following record was made on the proceedings—"The court-martial having carefully revised the evidence on the 1*st charge,* and having also considered the grounds upon which the court has been ordered to *revise their finding* on that charge; viz. '*that whereas the general finding of guilty of the whole of the first charge could not be legally sustained, inasmuch as no evidence was adduced at the trial in support of the allegation that the imputation was false of which the form and substance of that charge, in point of law, requires proof;*' the court, upon the before-mentioned grounds, does find that the *first charge* has not been legally proved. The court therefore reverses its *former* finding on *that* charge, and *acquits* the prisoner of the *first* charge (guilty of 2nd charge,) and adheres to its former sentence, and adjudges the prisoner to be dismissed from H. M. service" (65).

DEFENCE WITNESSES EXAMINED FIRST; OR AFTER WRITTEN DEFENCE.

1. *Adye* (66) stating that "The evidence on both sides being heard, and the prisoner having made his defence,"

(65) "Allowed to retire from the service by the sale of his commission; G. O. H. G. 11th August, 1836." From *Galignani's Messenger,* 17th June, 1837, it is stated "An intimation was given on Thursday, to the officers in Dublin Garrison, that the king has reversed the decision of a court-martial on *Capt. Raines,* late of the 77th Regt., who will appear in the *Gazette* as Capt. in the 95th, quartered in Dublin. This decision has been come to in consequence of the J. A. G. deeming the court-martial should have received in evidence, documents tendered by Capt. R., but which were rejected by the court." His name is in the army list for January, 1838, in the 95th Regt.

(66) Page 180.

must mean that the written defence, or the verbal defence, is made after the prisoner has examined his witnesses, for he adds "the prosecutor has a right, in case he finds it necessary, to make a reply." *Tytler* (67) says, "When the evidence in support of the charges, is closed, the prisoner sometimes judges it proper to submit to the court, either verbally, or in writing, a general statement of those defences which he means to support by evidence;" and (68) "when the whole evidence on both sides is closed, the prisoner may, if he thinks proper, demand leave of the court, to sum up, either verbally, or in a written statement, the general matter of his defence, and to bring into one view the import of the proofs of the charges, with such observations as he conceives are fitted to weaken its force; and the result of the evidence in defence, aided by every argument that is capable of giving it weight."

2. *Kennedy* (69) says, "After the prosecution is closed the prisoner enters on his defence; the most regular mode of conducting which, as it conforms to the practice of courts of law, and as it has been, I believe, observed at all courts-martial conducted by the J. A. G. is, that the prisoner should first address the court, and then produce his evidence. But a contrary custom prevails in *India*, (and elsewhere, according to *Tytler*,) for *there* the evidence in exculpation is in general concluded previous to the prisoner's addressing the court. This last method, it must be obvious, is most advantageous to the prisoner as it enables him to be fully aware of the exact nature of the evidence given on his defence; and thus prevents his hazarding in his address any remark or assertion on a supposition, as he must otherwise have done, that it *would* be supported by his witnesses."

3. The *Bombay* army rule is (70) that "The prosecution being closed, the prisoner enters on his defence, and may either address the court *first*, and then adduce his evidence;

(67) Page 252.
(68) Page 253.
(69) Page 71.
(70) Sect. xx. 41. Kennedy, p. 295.

or *defer* his address until the whole of his exculpatory proof has been laid before the court." *Simmons* (71) says, "The prisoner, being placed on his defence, &c. may proceed at *once* to the examination of witnesses; first, to meet the charge, and, secondly, to speak to his character, reserving his address to the court to the *conclusion* of such examination; or he may *previously* deliver a statement, commenting on any discrepancies in the evidence produced on the prosecution, placing his conduct, which is the cause of arraignment, in that point of view which he may deem most conducive to his exculpation, and pointing out the chain of evidence by which he proposes to establish the arguments adduced in his defence. The former mode is that usually adopted, as it is obviously more advantageous to the prisoner; since he is enabled to argue on facts and evidence actually established, instead of resting his defence on what may prove to be only hypothetical. It may not accord so exactly with the form of common law courts; but no proceeding is better established by the custom of courts-martial, than to leave the time of the delivering of the prisoner's address to his option; it may either *precede* or *follow* his examination of witnesses. Indeed, a prisoner, having generally addressed the court *previous* to the examination of his witnesses, may, if he thinks fit, at the *close* of his defence, *again* offer any remarks connecting his exculpatory evidence, and contrasting it with the evidence of the prosecution; or he may *open* his defence by a *detail* of the evidence he intends to bring forward, and *defer* his remarks upon the prosecutor's address till *after* the examination of his witnesses."

4. We have Adye, Tytler, (and by implication Sir C. Morgan, as he made no note against the position,) Simmons, and the *Bombay* army rule against Col. *Kennedy*. If he means by the practice "at all courts-martial conducted by the J. A. G." that he *Col. K.* always observed the practice which he calls "the most regular mode," there can be no doubt on the matter; but as the "contrary custom prevails in *India*," he is quite right, and I believe the *Bombay*

(71) Page 192.

army rule, clearly not framed by him, confirms this opinion. There are many advantages in observing, *lastly*, on the evidence on both sides.

5. The advantage of observing on the evidence *after* that on both sides has been given, enables the prisoner to contrast his evidence with that against him. It is impossible for any man to know all that his own witnesses may be able to swear to—a cross-examination, may elicit facts of which he could not be aware before, and if the most honest man in the world states what he does not prove, the discredit of the act operates against him, particularly if his evidence is of a doubtful cast. While by waiting to hear both sides, he saves this predicament. Again, if a prisoner states facts not proved, some think a reply is allowed, and if a reply be given to answer a false statement, why it is produced by the rule *Col. K.* contends for.

6. The conduct of a defence should be like that of the prosecution. The prosecutor should but briefly, if necessary, open his charges, or each count, if he likes, with a few preparatory words, for if he makes his speech first, and overcharges his accusation, the prisoner will retort, and this retort brings forth, severe remarks; so that the making a speech first is very likely to produce two evils, and to protract the proceedings. With regard to the common trials of soldiers, &c. particularly before *Regtl.* courts-martial, there are only a few facts to be proved, and those, few, frequently come out of the mouths of the witnesses for the prosecution, and the prisoner merely says a few words, and examines witnesses as to character. It is in the cases of officers that the rule which *Col. K.* calls the "most regular mode," would lead to replies and rejoinders, and to an endless train of bad consequences; while as to the practice we must take *Tytler*, where he is not contradicted by *Sir C. Morgan* as the best authority.

Proceedings read over each Day.

It is optional with the court to read over the proceedings of the previous day at each re-assembling of the court. If it

is done, there should be no witnesses present in court. It can seldom be necessary, and there is no rule directing the court to read them, and much time is lost by adopting the measure.

NOTES TAKEN BY MEMBERS.

Tytler having stated that it is customary to read over the proceedings, before proceeding to deliberate upon the judgment, which answers the double purpose of bringing the whole body of the evidence, in one connected view, to the recollection of the members, and (1) ascertaining the accuracy and fidelity of the record, by comparing it with the *notes* taken by individual members in the course of the trial. On *Colonel Quintin's* trial (2) the president said, "I have not my notes here, for they have become too voluminous to carry about with me; but I know I made out that number (3) from some paper I saw before the court." In taking notes, the member should ask the J. A. the page of the proceedings at which any fact is recorded. Jurors often take notes—the necessity for the measure must depend on the complexity, or otherwise, of the trial.

ALIBI.

Alibi (or elsewhere). "This term is used to express that defence in a criminal prosecution, where the party accused, in order to prove that he could not have committed the crime charged against him, offers evidence that he was in a different place at the time" (4). Mr. (now Baron) *Gurney* on the trial of *Cochrane and De Berenger* (5) said, "an alibi (sometimes resorted to in courts of criminal jurisdiction), is the best of all defence if a man is innocent; but if it turns out to be untrue, it is conclusive against those who resort to it." Such a plea should be received with caution. *Kennedy*

(1) Page 310.

(2) Page 243.

(3) 72 punishments in the 15th Hussars; but p. 218 shows 146 men tried from 14th December, 1812, to 15th July, 1814, in 19 months!

(4) Tomline's Law Dictionary.

(5) Printed Trial, p. 41.

says, (6) if the prisoner attempts to prove an *alibi* the prosecutor is allowed to examine witnesses; and this in his reply.

NEW MATTER.

1. *Adye* (7) says, if *new* matter has been introduced into the defence, the prosecutor has the right of controverting it by evidence. *Kennedy* (8) says, "it will be evident that all the circumstances, which the prisoner may adduce in evidence for the purpose of palliating the misconduct imputed to him, must constitute *new* matter, as such circumstances could not have been anticipated by the prosecutor. Yet courts-martial are frequently unwilling to consider it as such, because it was not intended to refute the charge, but merely to extenuate the prisoner's culpability."

2. On Lieut. Genl. Sir J. Murray's trial (9) the J. A. said, "I would state in some measure in answer to that, that *new* matter introduced in the defence, which the prosecutor had not reason to expect, and which therefore, he could not be expected to meet in the original case, lets in evidence in reply; I mentioned, the court will recollect, one instance of that kind, a case of mutiny, where a reason is given in the defence, force for instance on the part of others; that may be disproved in reply, and in trials in criminal courts, a prisoner has stated in his defence, the prosecutor owes me a grudge, or he owes me money, and he wants to get me hung that I may not get my money; the prosecutor is in such a case called back to contradict that."

3. *Simmons* (10) says, alluding to the *reply* to the defence, "to rebutting the *new matter* brought forward by the prisoner, and supported by evidence." The rule in the *Bombay* Code of Mily. Regns. (11) declares, that "the prosecutor

(6) Page 62.
(7) Page 180.
(8) Page 83.
(9) Printed Trial, p. 480.
(10) Page 198.
(11) Sect. xx. 40. Kennedy, p. 294.

must, during the prosecution, and before the prisoner comes on his defence, produce all the evidence he has to support the charge; and after the prosecution has been closed, he shall not be permitted to adduce any *further* evidence, in proof of the specific facts, alleged in the charge." On the trial of Lieut. (now Capt.) P. O'Hanlon, 1st (Bengal) Light Cavalry (12) Major General Watson, in command of the forces, made these remarks: "The Major General also considers the production of the opinions and censures of the Major General in command of the forces on the conduct of the prisoner, for which he was then actually under trial, to be objectionable, and that they ought not to have been received" (13).

4. *New matter by neither party.* If it is not proper that the prosecutor should be allowed to introduce *new matter*, neither should it be admitted on the defence. The *Bombay* rule should have applied also to the defence. I cannot agree with Col. *Kennedy* that all palliating or extenuatory circumstances which the prisoner may adduce in evidence should be considered as *new matter*—that is, *new matter* in its strict sense—any thing urged in evidence against a prisoner to aggravate the charge, if supported by evidence, would amount to such new matter, as should entitle a prisoner to rebut it by evidence. There is a great difference between new matter of accusation, and facts proved by evidence to mitigate the sentence; in the same way that, after an action, affidavits are, at times, produced to lessen the damages.

(12) G. O. C. C. 20th Nov. 1834.

(13) There were three letters from the Adjt. Genl. to the address of the Major Genl. Comg. at Meerut. The prisoner gave in a paper objecting to the above, which was recorded. The admission of those letters on the prosecution, and the words of the 6th charge, "*a systematic course of mortification and slight in active operation against him*" (Lt. O'H.) led to the introduction on the defence of *new* matter; and produced a reply. Had those words been omitted, and the letters above mentioned not been produced—all the *new matter* in the defence and the reply itself might have been saved.

DECISION AS TO OBJECTIONS, BY MAJORITY.

1. *Simmons* (14) says—"The majority of votes decides all questions as to the admission or rejection of evidence, *and on other points involving law or custom; and in such* cases, (but not as to the finding or sentence of the court,) where the votes are equally divided, the custom of the service, and the necessity of the case, justifies the decision of the question on the side on which the *president* may vote." Though *Tytler* (15) says, "If however, by the death or necessary absence of a member of a court-martial, which originally consisted of an unequal number, the court should be equally divided in opinion, the side on which the president gives his vote must be understood to have decided the question, which in effect, is giving the president, who in all cases is entitled to vote, a double voice in that particular emergency."

2. Sir C. Morgan (16) states—"It is *now* held at the Horse Guards, that a president has no casting voice, and that the president and every member (be the number assembled what it may) of a court-martial is bound to vote in the judgment of the court. A different, but certainly an erroneous opinion has prevailed, and it *has been* usual where more than 13 members have been sworn, to strike off the overplus, in the sentencing of a prisoner."

3. *Delafons* (17) gives the opinion of Dr. Paul, 1746, to the Law Commissioners of the Admiralty that, if equally divided in opinion there can be no judgment, but adds, "the point at issue may be re-considered." *Delafons* (18) had previously stated that the custom adopted in the *French* service was, that the president, "if he gave his vote or opinion in *favor* of the prisoner, to have the effect and force of *two voices*, but only of one, if *against* him." *McArthur* (19) (who also quotes *Dr. Paul's* opinion) says, "If an equality of votes still continues, the matter in debate must remain as it stood before the question was put," and quotes printed

(14) Page 134.
(15) Page 135.
(16) Note to Tytler, p. 135.
(17) Page 252.
(18) Page 249.
(19) Vol i. p. 320.

instructions (1806) under the head of Courts-martial, article 12.

4. *McNaghten* (20) observes, "in the *Bengal* army, I *never heard it denied that the president's vote had the power to destroy the equilibrium of sentiment, until the year 1817,* when it was so decided by the *Marquis of Hastings* on the trial of Assistant Surgeon Pears," and (21) remarks, "and in Genl. orders His Excellency *(Genl. Sir C. Paget)* declared, that the president's vote was always to be considered as sufficient to turn the scale, in cases of equality, and even expressed his astonishment that of so well known a rule the court should have been ignorant," *Capt. McNaghten,* as Offg. J. A. G. gave this opinion of course.

5. *Kennedy* (22) in opposition to Sir C. Morgan, says, "directly contrary to this is the practice of courts-martial held in the army of *India,* and it is believed of such as are held in H. M.'s forces every where except at the Horse Guards; for at them, in conformity to the opinion of Tytler, the president has always a casting vote when the court is equally divided."

6. Tytler, McNaghten, and Kennedy, are in favor of the double vote in case of an equality of votes. Delafons, McArthur, Simmons, (except as to decisions not relating to the finding or sentence,) Dr. Paul, Sir C. Morgan, and naval printed Regulations, are against the president having a double or casting vote. So six to three are against the measure. It is not allowed in courts of *law,* nor in the *navy*: and why should it be in the *army?* The chief judges of the supreme courts in India; the Gov. Genl.; and governors in counsel, and the chief commissioner of the Calcutta court of Requests, have, when the opinions are equally divided, a double vote, but this is by charter; and proclamation.

7. Where the Articles of War are silent, we refer to the courts of law; and besides that the judges there have no

(20) Page 130.

(21) Page 133, referring to trial of Private Neal, H. M.'s 44th Foot, G. O. C. C. 23rd Aug. 1824.

(22) Page 24.

double vote, no juror or judge can assume to do what is not laid down by authority. That it *was* the practice at one time in the *army* would appear from the words of *Sir C. Morgan.* "It is *now* held, &c." It has been stated, "that the president is to have a *casting vote* was formerly expressed in the Articles of War; and though it is now discontinued, yet it is not to be considered as a statute repealed; but is still in force by the *custom of the army*" (23). It is not the custom in the *Bengal* army.

8. The reason given by *Simmons* why it is necessary in deciding as to the admission or rejection of evidence, is not a good one. It might admit evidence affecting the prisoner's conviction; and it may so happen that the president does not possess any very superior intellect. If the admission or rejection of evidence against the prisoner depended upon this double vote, the votes must be, otherwise, equal, and in cases of doubt, the prisoner should have the benefit; while, in this case, the president might be the means of objecting to the *admission* of evidence in *favor* of the prisoner. It cannot be said that if seven vote *pro*, and seven *con*, material justice requires a double vote from any *one* individual, whose vote, perhaps, was erroneous in the first instance. I would rather give the *double* vote in *favor* of the prisoner.

9. Rule Proposed. That there is no *double* or *casting* vote allowed to the president of any *naval* or *military* court-martial in any case; by the Articles of War, or by the custom of the service.

Contempts.

1. The Articles of War (93rd) direct that "No person shall use menacing words, signs, or gestures in presence of a court-martial; or shall cause any disorder or riot, so as to disturb their proceedings, under the penalty of being punished at the discretion of the said court." *Simmons* (24) says, "It may be remarked, that the contempts thus rendered

(23) The ancient custom as stated by *Bruce*, (Institutions of Mily. Law, p. 208,) p. 269. M. S. Bengal J. A. G.'s office.

(24) Page 148.

punishable summarily by courts-martial, are of a public and self-evident kind, not depending on any interpretation of law admitting explanation, or requiring further investigation. Courts-martial sometimes act on this power; at other times, individuals coming within the declarations of this article, have been placed in arrest, and charges have been preferred in consequence." He also quotes a case from my work published in 1825, (25) where, in Bengal, in 1791, a prosecutor for reading a paper which he called a *protest,* which the "court determined is an insult of the grossest kind, on the proceedings of this court, replete with misrepresentation, and a reflection on the dignity of courts-martial, and that, after the repeated reprimands Mr. P. has already received from the court, and experiencing their lenity to so great a degree as he has done, by several instances of his conduct being hitherto overlooked; they find themselves under the indispensable necessity of ordering him into *arrest* for his contumelious, disrespectful conduct. And feeling the necessity of discouraging, in the most exemplary manner, all sorts of *intemperance* and *contempt* towards the only tribunal that exists for the preservation of discipline in the army, (Genl. courts-martial,) they pronounce Mr. P. surgeon of the 5th European Battalion, guilty of a breach of the 13th Art. sec. xii. of the Articles of War (26) and they *sentence* him; and he is hereby sentenced to be suspended from his rank, pay, and allowances in the H. C.'s service, for the term of six months."

2. In courts of law the judge would commit, and call up for judgment, and sentence the person to fine and imprisonment. In the case of Surgeon P. the Genl. court-martial exceeded their power. As observed by *Simmons,* (27) "A *Regtl.* court-martial may punish summarily; but, from their constitution, are not competent to award any punishment to *commissioned* officers. A Regtl. court-martial, however, under such circumstances, may impose an arrest on

(25) Page 445.
(26) Similar to sect. xiv. Art. xix. Annual Act, 93.
(27) Page 149.

any officer of whatever rank, though each individual member may be his junior" (28). With regard to persons not of the military profession, though the military court cannot place them in arrest, still they could be removed from the court by force, if necessary; and in other cases they would be liable to an attachment, on application to the Supreme Court of India, or the courts in London, Dublin, or Edinburgh, &c.

Publication of Proceedings.

1. *Simmons* (29) says—"It is competent to a court-martial to forbid the publication of its proceedings during the trial (30) and any breach of the order may be prosecuted as a contempt of court, in the Queen's superior courts. On *Col. Quentin's* trial the J. A. said "The only mode I believe in which it has ever been done, or in which it was necessary to do it, was by expressing the wish of the court that it should be prevented. I remember the same feeling in the mind of the court for the trial of *Col. Johnstone :* there the wish was expressed by the court, and I found that in recommending it I was only pursuing the course which had been laid down by my predecessors. Every body must see how extremely important it is to the final attainment of justice, and how reasonable it is for all parties that the mind of the public should not be dragged backwards and forwards, by any *partial* statement of the proceedings on particular days; and I feel persuaded that the expression of this wish on the part of the court will be attended to as it always has been."

2. On the trial of *Major H. D. Coxe,* 25th N. I. (31) the *J. A.* said—"I am desired by the court to request that if there are any persons in court taking *notes* of the proceedings, they will abstain from publishing any parts of the pro-

(28) Court-martial on Major Browne ; Samuel, 635.

(29) Page 150.

(30) Lieut. Genl. Whitelocke's trial, p. 7. Lieut. Col. Johnstone's, p. 3. Col. Quentin's, p. 6.

(31) G. O. C. C. 27th Dec. 1834.

ceedings till the whole shall be concluded." On the trial of *Lieut. Col. Dennie*, H. M.'s 13th Light Infantry (32), the *prosecutor* requested "that the court would prohibit the publication of any partial and garbled version of its proceedings. That he understood the *defendant* had yesterday requested leave to publish daily, the trial, as it transpired." *(Court closed)* "The court decided that all unauthorised publication of its proceedings shall be prohibited."

3. Of course any *military* man might be tried, for disobedience of orders, if he published any part after such a notice—in the case of a person not of the military profession, the court could only report it to Government through the usual channel; with a view to a civil prosecution.

Character.

1. *Sullivan* (33) says, "The prisoner is likewise permitted to adduce the testimony of persons of reputation, in support of his character and the integrity of his life; for if for mutiny, desertion, or any other crime, there shall be nothing but presumptive proof adduced, the evidence of his former good conduct, will indisputably serve to influence a decision in his favor." *Delafons* (34) says, "And an oath is administered to *every* witness at a *Naval* court-martial, *except* to any officers who, at the desire of the prisoner, are called upon to speak as to his general character and conduct," and (35) "particularly if the defendant has served under them; but the officers so called upon are not *(by the usage of Naval courts-martial)* under the necessity to give such evidence on oath; because it does not relate to the charge against the prisoner, and can only have effect in respect to mitigation of the punishment he might be liable to have inflicted on him."

2. *Adye* (36) does not state as to swearing these wit-

(32) G. O. C. C. 28th (K. T. 15th) July, 1836.
(33) Page 42.
(34) Page 226.
(35) Page 233.
(36) Page 187.

nesses to speak to character, nor does *McArthur* (37). *Simmons* (38) says, "Courts-martial do not literally adhere to the rule in courts of *civil* judicature, which requires that evidence, as to the character of the accused, should bear analogy and have reference to the nature of the charge in issue. It has ever been the practice of courts-martial, recently confirmed and enforced by a General order, (39) to admit evidence as to the prisoner's character, *offered by him,* immediately after the production of his witnesses to meet the charge, whatever may be its nature : a prisoner is even permitted to put in proof particular instances wherein his conduct may have been publicly approved by superior officers."

3. The *Bombay* code of Military Regns. (40) directs that—"When witnesses are called to character, they must be duly sworn, and cannot be cross-examined, nor can any examination take place into particular facts. But the witness may be called upon to assign his reasons for the character, which he has given in evidence." In reply to *Delafons* (though *McArthur* is silent), it will be seen that he stands alone in his opinion: article 91 of the Articles of War directs that "All persons who give evidence before any court-martial are to be examined upon oath," which is conclusive of the necessity, or otherwise. And even a member who has been sworn as such, must be re-sworn (as a witness) before he speaks as to character. "Witnesses on *oath,* as to *general character* of the prisoner may be examined on the defence." (*G. O. H. G.* 24*th February,* 1830).

4. *Sometimes by letters.* On Col. *Quentin's* trial (41) the J. A. G. said "Where an officer on his trial wishes to have his character spoken to by officers of high rank and character, whom he does not bring before the court, nothing is more common than to introduce their letters in his speech,

(37) Vol. ii. p. 87.
(38) Page 363.
(39) Genl. Regn. p. 670.
(40) Sect. xx. 64. Kennedy, 300.
(41) Page 35.

and they are then attached to the proceedings." At the conclusion of Lieut. Genl. *Whitelocke's defence two letters were read and recorded* (42) *and one copy* (43) *of* a letter as to his character, the J. A. G. made this remark: "This is the *copy* of a letter, &c. I ought to observe to the court, that these letters, strictly speaking, are not legal evidence; and I think it right to make that observation; at the same time, as conducting this prosecution, I do not make the slightest objection to their being produced." On Col. *Quentin's* trial (44) a letter was objected to, because as the J. A. G. said, "I find, however, the letter, in giving a character to Col. Q., states *particular* facts which called for his *(Lord Stewart's)* approbation, those particular facts, the court have already decided, could not be examined into, if Lord S. was here present as a witness; much less, therefore, could they be received in evidence when merely from a letter."

5. *Certificates* of, not properly received and placed on record when no apparent cause for the non-attendance of the writers (45): Prisoner may produce *Defaulter's book* (46).

6. *General character.* If tried for treason, witnesses to prove loyalty. If for murder, to prove general humane character. If for theft, character for honesty and the like.

7. *Cross-examination as to.* The *Bombay* army rule is that (47) "When witnesses are called to character they cannot be *cross-examined,* nor can any examination take place into *particular* facts. But the witness may be called upon to assign his *reasons* for the character, which he has given in evidence." *McNaghten* (48) says, "It is generally considered that a witness to character is not liable to cross-examination, and in most cases his testimony is not of a nature even to require that test of its correctness. But there may

(42) Pages 788 to 791.
(43) Page 791.
(44) Page 227.
(45) G. O. C. C. 16th Dec. 1829.
(46) G. O. C. C. 22nd Sept. 1835.
(47) Sect. xx. 64. Kennedy, p. 300.
(48) Page 187.

be instances in which the scope of such deposition renders it necessary (in his own opinion at least) for the opposite party to cross-examine upon it, and in no such cases can he be legally prevented. A witness to character often speaks to certain facts, and either lays too much stress upon them, or gives to their circumstances too high a colouring." *Simmons* (49) does not say a word on the point. He speaks of cross-examination *by prisoner* when the *court* call for his character.

8. *Legal rule* (50) *Russell* states, "In all criminal prosecutions the prisoner is always permitted to call witnesses to speak to his general character, who are usually examined in his behalf, as to how long they have known him, and what his general character for honesty, humanity, or peaceable conduct, (according to the nature of the offence charged,) has been during that time. The inquiry ought manifestly to bear some analogy and reference to the nature of the charge against the prisoner," and "it has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character however excellent is no subject for their consideration; but that when they entertain any *doubt* as to the guilt of the party, they may properly turn their attention to the good character which he has received."

9. Where a witness gives a general character of a prisoner; the prosecutor, or court may ask how long he has known the prisoner; and whether he has known him from that to the present time without any interruption. And as the witness may speak of the prisoner's character from *general report,* and not from his *own knowledge,* it is obvious that it is allowable to ask "Do you speak from your own knowledge; or from general report." *Cross-examination,* strictly speaking, must result from matter in the evidence *in chief.*

(49) Page 364.
(50) On Crimes, vol. ii. p. 703.

Now, though the prosecutor cannot deviate from that rule the court may satisfy themselves; but must not go into particulars: and as (51) " It would not be allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence, as that charged against him:" so though a prisoner indicted for *murder* may have been cruel on a particular occasion, while generally of a humane disposition; the witnesses could not be cross-examined as to the particular instance.

10. *As to the time to which it refers.* On Col. *Quentin's* trial the J. A. G. said, (52) "the facts referred to are in years antecedent to the date of these charges, and none of them connected with these charges: no person can suppose it possible that *Lord Stewart* should have stated any thing untrue; but I will suppose the possibility of a letter being written, stating acts of most heroic gallantry some years back, and produced by a person on his trial: those the person on the other side may know not to be true; and he may say I will undertake to prove that the officer, or whoever it may be on trial, was not present, or did not so act. No, says the court, we cannot enter into that."

11. Rule Proposed. That it would appear not to be the practice of the courts of law to admit of cross-examination of the evidence as to character; and therefore, it should not be allowed at courts-martial.

Reply.

1. *Sullivan* (53) says, " the J. A. is allowed to reply (54) to his defence; not, however, upon any *new* subject matter that shall appear, but strictly to that which shall relate to the original charge." *Delafons* (55) says, " the prisoner having made his defence, the prosecutor has a *claim*, in case he finds it necessary, to make a reply. By a reply is to be under-

(51) Phillipp's Law Evi. vol. i. p. 170.
(52) Page 236.
(53) Page 42.
(54) Lord Geo. Sackville's printed trial, p. 204.
(55) Page 230.

stood, a right of observing upon the evidence in general, and also a right of controverting, by evidence, any new matter introduced by the prisoner in his defence." *Adye* (56) says the same as *Delafons*. The author of the Military Law of England (57) agrees with *Sullivan*.

2. *Naval Rule.* McArthur (58) says on Admiral *Keppel's* trial the court decided against a reply—"It not occurring to the recollection of any of the members, that it has ever been the usage at courts-martial to admit anything on the part of the accuser, after declaring he had gone through all the witnesses he should produce in support of the charge; it is on this occasion agreed, that the paper now offered by the accuser cannot be admitted."

3. *Tytler* (59) says—"To this statement, *(defence)* on the part of the prisoner, the prosecutor has a *right* to make a *reply;* and under this privilege he may either recapitulate, methodise the import of his evidence, and strengthen it by pertinent argument, or show the weakness and insufficiency of the proof in exculpation: and here, in strict regularity, the trial ends. "If (60) the prisoner in his defence shall have introduced any *new matter*, encountering the evidence of the charge, but to which that evidence was not directed, the prosecutor is allowed to examine witnesses to that *new matter:* as, for example, a prisoner is charged with an act of *mutiny*, and the charge is clearly proved; but the prisoner in his defence alleges, and adduces evidence to show, that he was compelled by others to the commission of the act, against his own will, and at the hazard of his life. This being *new matter*, to which the former evidence for the prosecutor does not in the least apply, the prosecutor is allowed to redargue it by the examination of witnesses, or the production of such documents as he thinks fitted to disprove it."

4. *Sir C. Morgan* (61) observes—"The prosecutor is allowed by argument to *reply*, but not to bring evidence unless *new matter* has been brought forward in the defence." *Ken-*

(56) Page 180.
(57) Page 124.
(58) Vol. ii. p. 184.
(59) Page 253.
(60) Page 255.
(61) Note to Tytler, p. 253.

nedy (62) says, "*The prosecutor can then (after the defence) observe upon the whole evidence, but can produce none.*" "But if the prisoner in his defence introduces any *new matter*, or any evidence not examined into by the prosecutor, which is frequently done, when the prisoner cannot contradict the evidence against him, or does not think he has so fully done it, as to rely merely on the contradiction, and has other collateral matter to give in evidence, from which his innocency is to be presumed, as the attempt to prove an *alibi*, or good character, or to discredit the witnesses of the prosecutor, then the prosecutor is allowed to examine witnesses on the *new matter*." And, again, (63) "In all cases where a prisoner calls *witnesses* in support of his defence the prosecutor has a *right* to make a reply."

5. *Simmons* (64) says, "The prisoner having closed his defence, the prosecutor is entitled to reply, when *witnesses* have been examined on the defence, or when *new facts* have been opened in the address, or new observations or inferences made. Thus, though no evidence may be brought forward by the prisoner, yet should he advert to any case, and, drawing a parallel, attempt his justification, the prosecutor will be permitted to observe on the case so cited. It, however, seldom happens that a defence takes place before a *Genl.* court-martial, without the examination of witnesses; a *reply*, therefore, almost invariably follows the prisoner's address. Should the prisoner have examined witnesses to points not touched on in the prosecution, or should he have entered on an examination reflecting on the credibility of the prosecutor's evidence, the prosecutor is allowed to examine witnesses to the *new matter*; but the court will be very guarded to prevent the examination by the prosecutor on any point not introduced by the prisoner."

6. *On what trials has been allowed.* On the trial of Lord George Sackville, (65) in 1760; of Lieut. Genl. Whitelocke, (66) in 1808; of Lieut. Col. Johnstone, (67) in 1811;

(62) Page 62.
(63) Page 81.
(64) Page 197.
(65) Page 204.
(66) Page 793.
(67) Page 389.

of Col. Quentin (68) in 1814, and of Lieut. Genl. Sir J. Murray, (69) in 1815. The trials of Whitelocke, Johnstone, and Quentin, were conducted by the J. A. G. On *Sackville's* trial it is recorded, "The evidence being closed, the D. J. A. G. submitted to the court some few observations in answer to those made by Lord G. Sackville in the course of his defence, and upon the evidence in general;" on that of *Whitelocke,* the J. A. G. said—"Though the unprecedented length of Genl. W.'s defence, might perhaps, according to the usage of courts-martial, entitle me to claim some time for consideration on the arguments he had adduced." On *Johnstone's* trial, it is recorded (Govr. Bligh's reply), "In offering some remarks upon the defence which Col. J. has presented to the court, and which he has endeavoured to establish by evidence." On *Quentin's* trial Col. Palmer made the reply. On *Murray's* trial the Offg. D. J. A. G. made a reply on the two first charges; and Rear Adml. Sir B. Hallowell on the 3rd charge, observing "The examination of the witnesses on both sides having now closed, I shall beg your permission to offer a few observations on the evidence which is before you; and to reply to the address of Sir J. Murray, which has been read to the court in opening his defence." Evidence was adduced in all the above trials on the defence.

7. The *Bombay* rules (70) are that "In all cases where a prisoner produces evidence on his defence, a prosecutor has a *right* to *reply,* but he cannot adduce any fresh evidence unless *new matter* has been introduced on the defence, in which case he is allowed to controvert this new matter by evidence," and, "when the prisoner has not adduced evidence on his defence, it remains in the discretion of the *court* to determine whether the prosecutor shall be permitted to reply or not. In deciding on which point, no better rule can be prescribed for its guidance, than that a reply should be permitted whenever the defence contains any assertions or any matter, on which the prosecutor has not previously

(68) Page 233.
(69) Page 512, 540.
(70) Sect. xx. 45, 46. Kennedy, p. 296.

had an opportunity of addressing the court; for it is equally impossible for the court, as for the approving officer, to do impartial justice unless the whole of the case of each party is fairly brought before them." It has been intimated to the *Bengal* army that it is improper in a J. A. to make a reply, where there is no evidence on the defence, nor new matter (1). Replies have often been allowed in the *Bengal* army; but not as a *right* to any private prosecutor.

8. *Rule of courts of law.* Lord C. J. Mansfield on the trial of John Horne Tooke for a libel in 1777 (2) said, "The *plaintiff* knows his own case; he knows his witnesses; he opens it; he observes upon his witnesses; and he draws* such conclusions from them as he thinks proper, to persuade a jury to *increase* the damages. The *defendant* if he only makes *observations* upon the *same* evidence to the jury, to *lessen* the damages; why then, there is *nothing new*, there is *no new matter* at all; and by the practice, for expedition in *civil* causes, and in prosecutions in the name of the king with common informers, the practice is, that they *don't reply* where that is the case. But, notwithstanding that, if the defendant was to start a *point* of *law*, the other *must* be heard. If he was to throw out to the jury, to catch and to surprise them, *allegations* of facts to which he called *no witnesses* to prove—there the counsel for the plaintiff may set the jury right, and lay them out of the cause, and show that they are absolutely irrelevant and immaterial. But, in *solemn* trials; in *state prosecutions*, where the Attorney General attends, I never knew it denied, but that he had a *right* to reply, though there was *no evidence* by defendant, but matters alleged in the defence." But there is an instance of the refusal of the court to permit counsel for the prosecution in a case of *murder* to reply when the prisoner *had* called *evidence* in his defence on the merits of the case (3); so that we see that, strictly, unless there be *new evidence*, or some points of law, stated in the defence; it is not usual to reply.

(1) G. O. C. C. 16th December, 1829.
(2) St. Trials, vol. xx. p. 664.
(3) St. Trials, vol. xvii. p. 353.

9. Rule Proposed. That no prosecutor not being the J. A. G. or D. J. A. G. should make a reply to any defence, unless new evidence or new matter shall have been introduced on the defence. That where any point of law, or other legal objection, shall be raised by the prisoner on his defence, or in any other way, it shall be answered by the J. A, or officer officiating as such. That observations made in a defence relating to the prosecution or the evidence, unsupported by proof not being evidence, no reply to such observations can be necessary. That it is the duty of the court to prevent any new evidence being introduced into the prosecution or defence; that the prisoner may urge, in his defence, any mitigating circumstances, or examine witnesses as to character or as to services, and produce testimonials relating to such facts: that no unproved allegations shall be considered as *new matter* entitling to a reply: that if any point of law be raised, or any matter requiring explanation; such is to be afforded by the J. A. That as a reply is not allowed in the *navy*, there seems no good reason why it should be in the *army*.

Rejoinder.

1. *Sullivan* (4) says, "And in like manner as the J. A, the prisoner may be indulged in answering him in rejoinder," and (5) "After this (reply), judgment should, in strict propriety, be passed. But as a Genl. court-martial is a court of equity and honor, as well as of law, they seldom or never, in any period of a trial, shut their ears to a prisoner's vindication of his innocence. The prisoner is consequently indulged in a reply: the J. A. rejoins to him, if he thinks proper." *Delafons* (6) says, "It cannot, I think, be deemed an indulgence to a prisoner, to be permitted, on application, to give in his answer to the prosecutor's reply; which is termed a *rejoinder*. Notwithstanding, such a liberty is considered rather a matter of special *favor* than of

(4) Page 42.
(5) Page 101.
(6) Page 230.

right, and seldom practised in the *navy* (7); for the prisoner has already had his opportunity of stating the evidence on both sides, and can have no new matter to controvert; because the prosecutor is not at liberty to produce any in his reply."

2. *Adye* (8) gives the same opinion as *Delafons*. The Author of the Military Law of England (9) says, "The *rejoinder* is a concession to the prisoner, for which he is solely indebted to the generous principles of martial (or rather perhaps *military)* law, and to the indulgence of the court. This *Col. Williamson* also points out as forming a prominent title in the common law of the army, or *custom* of war; being equally independent of the usages of common law and the statute, or written law of the army."

3. *Tytler* (10) says, "In such cases, it is customary for the court to allow the prisoner the liberty of a *rejoinder*, or answer to the prosecutor's *reply*; an *indulgence* to which, in ordinary cases, he is not entitled." *Sir C. Morgan* in his note observes, "Some doubts have arisen as to a prisoner's having a *right* to *rejoin* to the *reply* of the prosecutor, this mistake, however, is probably grounded on the supposition of a case which rarely happens, of a prosecutor being permitted to introduce *new evidence* in *reply*, in which case the prisoner is entitled to be heard upon such new evidence; and the prosecutor will be, in return, to a reply to the same extent. If the prosecutor in his reply introduces perfectly new matter (which in strictness is irregular) without calling evidence, it is but fair, either that the court should stop the prosecutor from going into such new matter; or if he is permitted to go on, to hear the prisoner afterwards in reply to such new matter. After this and the parties withdrawn, the court proceed to form an opinion and adjudge a sentence."

4. *Kennedy* (11) says, "Courts-martial have sometimes allowed the prisoner to *rejoin* to the prosecutor's *reply*, but

(7) McArthur, on *Naval* courts-martial does not admit of a *reply* even.
(8) Page 180.
(9) Page 125.
(10) Page 257.
(11) Page 86.

at Colonel *Quentin's* trial (12) the J. A. G. stated, "The prisoner has been permitted sometimes to address the court *after* the *reply;* but that is not the regular course, nor consistent with the ordinary rules of the court." *Simmons* (13) says, "*Cross-examination* of such *new* witnesses, to an extent limited by the examination in *chief,* that is, confined to such points or matter as the prosecutor shall have examined on, is allowed on the part of the prisoner, to whom, where *witnesses* are introduced in the *reply,* a *rejoinder* is permitted; wherein, by argument and deduction, he may endeavour to invalidate their effect; to which object he is strictly confined: but the prisoner is not permitted to call further evidence, except to re-establish the credit of such witnesses, as may, by the prosecutor's witnesses in his reply, have been impugned. To an extent limited by the arguments of the prisoner, the prosecutor is allowed a second reply, or *sur-rejoinder,* (14) as it is sometimes called. It is a rule in *civil* courts, equally observed in *military,* that the party which doth *begin* to maintain the issue, ought to *conclude.*"

5. The *Bombay* army rule (15) is that, "A rejoinder is not a matter of *right,* and should never be permitted by a court-martial; except when *evidence* has been adduced on the *reply.*" In the *Bengal* army, *rejoinders* have been allowed; but not often.

6. In Lord G. *Sackville's* trial (16) it is recorded, "Lord G. S. then desired the indulgence of the court, before he withdrew, to offer a few observations upon the evidence given in

(12) Page 34.

(13) Page 200.

(14) Kennedy, p. 87, note*, says, "On what authority Capt. Simmons has stated in his work, p. 169, (Edition of 1835, p. 200,) that the prosecutor is allowed to make a *reply* to the *rejoinder,* and the prisoner to sur-rejoin, I am at a loss to understand; for I never heard or knew of such a circumstance occurring at any court-martial. On the contrary, courts-martial have been in the habit of allowing *rejoinders* under the impression that the prisoner's addressing the court *last,* was favorable to him."

(15) Code, sect. xx. 47. Kennedy, 297.

(16) Page 219.

reply; which being obtained, &c." this closed the trial. On the trial of Lieut. Genl. Sir J. *Murray* (17), he *(Genl. M.)* made some observations on the evidence in reply. But, on Whitelocke's; Johnstone's; and Quentin's trials there were *no* rejoinders. From Sir C. *Morgan's* opinion it seems to have been the practice of Genl. courts-martial to allow of *rejoinders* where there was *new* evidence introduced into the reply. And he gives the prosecutor a reply (or *sur-rejoinder*) to the *rejoinder:* and hence must have arisen Captain Simmons' opinion. But, since Sir C. Morgan's time, it is never mentioned by any J. A. G. and I find no instance in the *Bengal* army.

7. Rule Proposed. That there should be no *rejoinder,* for, as the J. A. G. said on Col. Quentin's, "the prisoner *has* been permitted sometimes to address the court afterwards (after the reply); but that is not the regular course, nor consistent with the ordinary rules of the court. Sir C. M. *Sutton,* when J. A. G. (whom Col. *Kennedy* quotes) in 1815, says it is not consistent with the *ordinary* rules of the court. The rule of the *Bombay* army allows of a rejoinder when there has been *evidence* adduced in the reply. Such evidence should not be permitted in the reply. Sullivan, Delafons, and Adye, give the rejoinder, at the discretion of the court, though there has been no *evidence* in the reply: but the weight of authorities is against the practice.

Summing up by Judge Advocate.

1. *Sullivan* (18) says, "The J. A. reads the proceedings, or sums up the evidence, as may be most agreeable to the court, in each case elucidating such parts as may appear either to himself, or to the different members, worthy of their attention." *Tytler* (19) says, "In complicated cases; in circumstantial proofs; in cases where the evidence is contradictory; or in trials where a number of prisoners are jointly arraigned, as on charges of mutiny or the like, it is expedient that the J. A. should arrange and methodise the

(17) Page 505.
(18) Page 74.
(19) Page 310.

body of the evidence, applying it distinctly to the facts of the charge, and bringing home to each prisoner, where there are more than one, the result of the proof against him, balanced with the evidence of exculpation or alleviation. In ordinary cases, a charge of this kind from the J. A. is not so necessary."

2. Besides applying the evidence fairly to each side of the question, he should inform the court as to the *legal* bearing of the evidence; for it may be that the evidence shall, morally, satisfy the minds of the court, and still the evidence may, legally, be deficient. Or there may have been admitted evidence which ought to be rejected from their minds.

Proceedings read over before the Finding.

Tytler (20) says—"It is customary, before proceeding to deliberate upon the judgment, that the court should hear the proceedings read over by the J. A., which answers the double purpose of bringing the whole body of the evidence, in one connected view, to the recollection of the members; and ascertaining the accuracy and fidelity of the record, by comparing it with the notes taken by individual members in the course of the trial."

Votes or Opinions as to the Finding.

The J. A. collects the votes of each member beginning with the youngest. The 94th annual Article of War says "And in taking the votes of the court, the *president* shall begin by that of the youngest member;" but as in clause 15 of the Mutiny Act the president, instead of the J. A. administers the oath to the members of district and regimental courts-martial, so in article 94, the direction to the president in the *Queen's* service, must apply to courts inferior to Genl. courts-martial. *Simmons* (21) says, "The *president* (the J. A. formerly performed this duty), puts some such question as the following, to each individual member, beginning with the youngest and proceeding in inverse order:

(20) Page 309. (21) Page 212.

"From the evidence in the matter now before you, are you of opinion that the prisoner is guilty or not guilty of the charge alleged against him?" Kennedy (22) says, "The *J. A.* proceeds to take the opinions of the members, &c. and it is customary for the *J: A.*" He is the recorder of the court and keeper of the minutes; and therefore the proper person.

Votes taken on slips of Paper.

Tytler (23) in a note, mentions the *French* mode of taking the votes on a sheet of paper doubled down by each member, after he has written his opinion, and then passed on to the next senior member. I prefer slips of paper. The plan is an excellent one in cases where the charges are long, or complex; or where there is any object that no member should know the vote of the other members previous to giving his own vote; at times it must be very advantageous to adopt this plan.

Votes of the majority, &c. as to Finding.

The Articles of War require a majority in all cases; and where there may be a sentence of death as the result of the finding, 9 out of 13 or ⅔rds must concur in the finding of guilt. The president has no double, or casting, vote.

Special Verdict.

Captain Simmons (24) observes relative to the case of Lieut. Col. Broughton, 1st West India Regt., (25) the court with regard to the 5th charge "Was of opinion, that the prisoner was not guilty to the extent laid in the said charge, inasmuch as the prisoner was thereby charged with signing a false certificate on each monthly return, during the time he commanded the regiment, from June, 1806, to the present period; and it appearing from the evidence, that, in *some* of the months during that time, he did *not* sign such false certi-

(22) Page 150.
(23) Page 329.
(24) Page 219.
(25) G. O. H. G. 26th January, 1808. James's Decisions, p. 260.

ficates, and the court did therefore acquit him of the said 5th charge." H. M. was pleased "not to confirm the finding of the court upon the supposition that a court-martial was bound to find a *general* verdict, of guilt, or acquittal, upon the whole of every charge; and as the court have expressed their opinion that the prisoner was guilty of *part* of the 5th charge; they might, in conformity to that opinion, have found him guilty of *that part* of it, and have acquitted him of the *remainder;* instead of acquitting him *generally* of the whole."

Previous Convictions.

1. The 84th Article of War declares that "in the case of any soldier tried for any offence whatever, any previous convictions may be given in evidence against him." A district court-martial held at Kurnaul declined to receive the previous convictions tendered by the prosecutor; upon which the Commander-in-chief in India made the following remarks (26): "It appears (though not on the face of the proceedings, which would have been the proper place to have recorded the circumstance), that the president and court declined to receive evidence of the previous convictions of the prisoner under trial, although such evidence was tendered by the prosecutor at the proper time, and in conformity to the 21st section of the Mutiny Act and 84th Article of War."

2. Brigadier General Duncan, Comg. the division, called upon the court to state their reasons for this deviation from the usual practice; the court conceived that the *right* of receiving or rejecting such evidence is vested in the *court;* and that the court having already made up their minds to inflict on the prisoner the full measure of punishment, or nearly so, which the Articles of War permitted, they might use their descretion as to receiving or rejecting the further testimony offered. The proceedings being sent to the Commander-in-Chief he called for the opinion of the J. A. G. which was as follows:

(26) G. O. C. C. 25th July, 1836.

3. 1st. "That the option of offering, or not offering, evidence of previous convictions, rests with the same authority with whom rests the option of assembling the court-martial."

2ndly. "That, supposing due and legal notice of an intention to lay such evidence before a court be given to the prisoner and to the court, the court has not authority to refuse such evidence; (if in itself unobjectionable) or at their discretion, to dispense with the same."

4. "The president of a court-martial (H. E. observed), will recollect, that there are authorities in every military division, whose duty it is to remove any doubts which may arise relative to the construction of a section of the Mutiny Act, or an Article of War; and that when any doubtful point arises, it is preferable to refer that point to the officer who is responsible for the decision he gives; rather than to trust to any member of the court, however high an opinion may be entertained of his judgment or knowledge."

5. The case was referred to the General Comg.-in-chief H. M.'s Forces, and the following opinion was returned (27): "His Lordship has considered it his duty to refer the question which was there agitated to the proper authority, and he now commands me to acquaint you, that he has been advised that the evidence of the previous convictions of a prisoner having been duly tendered to a court-martial on the part of the prosecutor, in conformity to the provisions of the Mutiny Act and the Articles of War in that behalf, the court has no discretionary power vested in it of receiving or rejecting such evidence; but that they are bound to receive it, the same as any other lawful evidence which may be submitted for their consideration."

6. *The effect of* (28)—"When a soldier has been found guilty of the charge or charges preferred against him, the court, at that stage of the proceedings, is *bound* to inquire into and record the prisoner's former convictions, if any, and

(27) Horse Guards, 1st May, 1837. G. O. C. C. (Bengal) 29th July, 1837.

(28) Regns. and Orders for the army, p. 246.

his previous character, for its own guidance in awarding punishment, as well as that of the confirming authority in sanctioning its being carried into effect; for though in all cases the *maximum of punishment must not exceed what is considered due to the specific crime under trial;* yet previous good conduct and irreproachable character may give the prisoner a fair claim to lenient consideration, as far as the ends of discipline, and the established rules of the service will permit."

7. *Notice to prisoner.* It is stated (29) "That the president of any court-martial, other than a General court-martial, stands in the place of an officiating J. A.; it therefore falls within his province to take care, before the *court is sworn,* that the prisoner has had notice of the intention to bring forward previous convictions in evidence against him on his trial." The author states in a note that the question (as to notice) should be put to the prisoner in such a general way "as to leave the court ignorant of the existence of any such convictions, *until after the finding:* and suggests that the question be "*If the prisoner has received all the usual notices required by the Regns.*"

8. *Simmons* (30) says—"The duty of giving notice to the prisoner, attaches to the staff officer, whose duty it is to make him acquainted with the charge. The president, though acting in the place of J. A., as to administering oaths, advising the court when necessary, &c. cannot be intended to act as J. A. in all respects." The *Adjutant* of the prisoner's regiment is the proper person to give the notice; whether it be a district or a General court-martial. Then after conviction, the Adjutant is sworn and asked—"Has the prisoner had notice that the previous conviction or convictions against him would be given in evidence:" for, were the *president* to ascertain the fact he knows what he ought not to know till the conviction. The J. A. at General courts-martial usually reminds

(29) Page 30. Practice and Forms of District courts-martial, by a Field Officer, 1836.

(30) Page 59.

the Adjutant of this part of his duty when he sends the charge to the Comg. officer.

9. The field officer on district courts-martial (31) says—"The best and most conclusive evidence to bring forward to prove former convictions, is the production of the Regimental court-martial book; and this book should be invariably produced, if the trial takes place at the head-quarters of the corps to which the offender belongs; but as the practice hitherto pursued on trials held at a distance from the head-quarters; viz. that of ordering the Adjutant, or acting Adjutant to attend the court-martial, for the sole purpose of producing the court-martial book in proof of a prisoner's previous convictions, has been found to be very inconvenient and expensive, and not absolutely necessary; it has been decided that this practice may be dispensed with—it being sufficient for any officer, or N. C. O., otherwise summoned before the court-martial, to produce an *extract* from the said book, which he can verify by having compared it with the *original*, or which is *certified* by the signature of the Adjutant, or other officer having the custody of the book; provided the officer or N. C. O. producing the extract, can testify that the production of the book itself, would be attended with public inconvenience, and can further testify (in case such extract should be certified by any signature), that such signature is authentic." War Office, Cir. No. 772, 23rd July, 1834. G 66,721 / 2

10. *Simmons* (32)—"The author had considered that previous convictions, as used in the 21st clause of the Mutiny Act and 84th Article of War, could imply only convictions by courts-martial; but he is now assured upon the highest official legal authority, that the term *conviction* was introduced into the mutiny act as comprehending *all recorded offences*, whether submitted to trial by courts-martial or not; and that on proof of *notice* to the prisoner, (as laid down in the 21st clause of the M. A. and 84th article of War,) all '*summary convictions* by Comg. officers,' or decisions against a

(31) Page 31. (32) Page 228, note (4).

soldier recorded in the Defaulter's book (not limited to acts of drunkenness, as provided in the 51st Article of War, and as intimated in the two first lines of the 696th page of the General regulations of the army), may be admitted and dealt with as previous convictions."

General Character of Prisoner by Court.

Simmons (33) states, "It is declared by an order from the Right Hon'ble the General Comg.-in-chief, contained in a circular letter from the Adjt. General, a copy of which is directed to be placed in the possession of the president of every court-martial, for the information and guidance of the court, that after a *finding of guilt*, where the extent of punishment is discretionary *(in every case of trial of a soldier for a military offence)*, the court are authorized, if they think fit, to inquire by evidence into the *general character* of the prisoner, to enable it "to mete out punishment so as to satisfy the ends of justice with greater precision" (34).

Defaulter's Book.

Simmons (35) says, "It has been observed that the highest official opinion is to the effect, that a sentence of guilt by a court-martial, and a decision by a Comg. officer recorded in the *Defaulter's* book, are *alike* convictions, and as such equally to be admitted in evidence, after proof of notice to the prisoner, of the intention to produce the same; the *Defaulter's* book is, therefore, the best evidence of these summary convictions; because the conviction depends on the Comg. officer, and it is recorded in his own hand-writing, in this book, which is, moreover, at all times under his paramount control" (36).

(33) Page 237.

(34) Regns. and Orders for the army, p. 670. "The witness selected to depose to the prisoner's *general character* may, in order to *refresh his memory*, refer to the Defaulters' book; but he is not at liberty to read it to the court." (Field Officer on District court-martial, p. 32.)

(35) Page 230, note 2.

(36) Genl. Regn. p. 694.

Non Compos Mentis from Drinking.

Russell (37) states, that "With respect to a person non compos mentis from *drunkenness,* a species of madness which has been termed *dementia affectata,* it is a settled rule, that if the drunkenness be voluntary, it cannot excuse a man from the commission of any crime, but on the contrary must be considered as an aggravation of whatever he does amiss. Yet if a person, by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causes frenzy, this puts him in the same condition with any other frenzy, and equally excuses him; also, if by one or more such practices an habitual or fixed frenzy be caused, though this madness was contracted by the vice and will of the party, yet the habitual and fixed frenzy caused thereby puts the man in the same condition as if it were contracted at first involuntarily. And though voluntary drunkenness cannot excuse from the commission of crime, yet where, as upon a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse; the fact of the party being intoxicated has been holden to be a circumstance proper to be taken into consideration."

Votes as to Sentence.

If a member votes for death which is not carried by the votes of 9 out of 13 or two-thirds, he must vote some other punishment. *Delafons* (38) says, "It must of necessity be, either that those who voted for a capital punishment are silent, or acquiesced with the majority whose opinions carried the votes against sentence of death, in the proportion of punishment adjudged to be inflicted on the offender." All members must vote some legal sentence; and if that which any member votes for is not carried—some punishment must be voted till a majority agree as to one punishment. The votes may be taken upon slips of paper, each member signing his name.

(37) Vol. i. p. 7. (38) Page 274.

Acquitting Members vote Punishment.

1. *Sullivan* (39) says, "And those who have condemned him (for it cannot be supposed that those who have *acquitted* will assign him *any* punishment) are to pass sentence upon him." *Delafons* (40) says, "For it is absurd to suppose, that such as have found *not guilty*, would assign a punishment." *Adye* (41) says the same as *Sullivan.* The *Mily. Law of England* says, (42) "And those who have condemned him are to pass sentence upon him, subject to the *mitigation* of those who have *not* found him guilty, whose voices though overpowered by the majority in respect to the guilt of the prisoner, have yet equal weight, in the *diminution* of the punishment, in proportion to the number who thought him innocent."

2. *McArthur* (43) says—"A question arises, whether a member under any circumstances refusing to sign a sentence voted by the majority, would not be liable to punishment if tried by a court-martial? To this there can be no hesitation in answering most decidedly in the affirmative: because it would not only be an act of disobedience to what is enjoined in the printed instructions issued by the king (or queen) in council, through the Lords commissioners of the admiralty; but it would be an act of contempt and insubordination, as flying in the face of the *immemorial usage and custom of the navy in like cases.*"

3. *Sir C. Morgan* (44) in a letter to a D. J. A. G. says, "I have not any difficulty in answering, that such members of a court-martial, whose votes have absolved the prisoner of the crime objected to him, ought not to be called upon to award *any* punishment which they cannot, consistent with reason or justice, do. The question of punishment addresses

(39) Page 75.
(40) Page 270.
(41) Page 189.
(42) Page 131.
(43) Vol. i. p. 321.
(44) McArthur, vol. ii. p. 374. Lr. to Major Drinkwater, 22nd May, 1795; and see note to Tytler, p. 312.

itself to those members exclusively who have found the prisoner guilty; but it may, perhaps, not be amiss to intimate, if it should happen that the officers who compose the majority of the court, and who have concurred in the conviction of the prisoner, should differ in sentiment with respect to the degree of punishment, in such case the prisoner ought to have the benefit of a presumptive opinion of those members who have absolved him thrown into the scale with the votes of those who incline to the *lesser* punishment for the prisoner, otherwise the prisoner, would be put in a worse situation, than if those members had deemed him in some degree culpable. This appears to me consonant to equity, but does not rest upon my opinion merely; it is conformable to the practice which has invariably prevailed in every case that occurred within my experience."

4. *Sir C. Morgan* (44) says, in nearly the same language, in his note on Tytler's 3rd edition, which must have been about the year 1806—"Such members of a court-martial, as have by their votes absolved a prisoner, are not required to give a vote, when the question of punishment is proposed, in consequence of the prisoner having been convicted by a majority of the members of the court-martial; as it seems incongruous that one, who thinks the prisoner not guilty, should give a voice for the inflicting of *any* punishment; but the *number* of the members who have *acquitted* him are always counted in *favor* of the prisoner; and thrown into the scale with those who vote for the mildest punishment."

5. *Tytler* (45) says, "Nor are those members who have in the previous question voted for *acquittal,* to be *debarred* from voting on the second, which is to decide the degree or nature of the punishment: for it would be most unjust, that those, who thought so favorably of the prisoner's case, as to vote for absolute *acquittal,* should from that circumstance be precluded from rendering his punishment as mild as possible."

6. *McNaghten* (46) properly says, the plan of *Sir C. Morgan,* "gives the acquitting members a vote, while it denies their right to vote, and accords to their silence all the

(45) Page 312. (46) Page 119.

power which the law gives to the other's word." *Kennedy* (47) says, "And every member must give his vote whether he has acquitted or convicted the prisoner; such is the established practice of courts-martial held in the army of *India*; and, I believe, of all courts-martial held in H. M.'s army, except of such as are assembled at the Horse Guards."

7. The *Bombay* army regulation (48) directs that, "The *minority*, even if they have acquitted the prisoner, as well as the *majority*, are bound by their oath to duly administer justice by awarding such a punishment as is proportionate to the degree of guilt of which the prisoner has been convicted. No mitigating circumstances whatever ought then to influence their judgment, and their attention ought solely to be directed to the nature of the offence; to the custom of war in the like cases; and to the effect which their sentence may produce, towards maintaining the discipline of the army."

8. *Simmons* (49) says, "Notwithstanding the conflicting opinions, the prevailing custom of the army is, that each member should give his opinion as to the nature and degree of punishment, though he may have voted for an acquittal. The *majority*, in every case, binds the *minority*; the opinion of the *majority* is the opinion of the court. As a court-martial acts in the two-fold capacity of judge and jury, it seems consistent with reason and justice, that, having performed the duty of jurors in recording a verdict, they should proceed inthe character of judges, acting *independent* of their individual votes as jurors, to award punishment *equal* and *adequate* to *that* degree of guilt, of which the prisoner *has, by the court*, been adjudged and declared guilty."

9. *Bengal army*. It is the practice of the Bengal army for the acquitting members to vote as to punishment, and repeated references to the J. A. G. have received the same answer (50), and was so decided in the case of Branigan,

(47) Page 167.
(48) Sect. xx. 68. Kennedy, p. 301.
(49) Page 240.
(50) Lr. No. 256, J. A. G. 8th Sept. 1832.

H. M.'s 31st Regt. (51) on which occasion a member could not be prevailed on to vote *any* punishment, the consequence was a reference, and delay; and the member in the end did vote; though a small punishment; his vote did not affect the prisoner's sentence who was transported for seven years. On one occasion (52), on the trial of Killeen, H. M.'s 44th Foot, an *acquitting* member declined voting. The J. A. went to his house to search for precedents, and finding *Kennedy* pro, and *Sullivan* con—the court decided on proceeding, passing over the member, who had declined to pass sentence. The sentence was to be "*hanged,*" commuted to "*transportation as a felon for life.*"

10. *Compelled.* In another case (53) a member refused to give his vote or opinion as to the *repeated desertions.* The J. A. said members were *bound* to vote by their oath, as the court had admitted the *facts* on record. That as J. A. he must suspend proceedings and report to higher authority. The vote of court determined that the member *must* vote. The member declined. The court arrested proceedings and reported to the Commander-in-chief. The court re-assembled and the letter from the Mily. Secretary, to the president (54) was read to the court, stating "That the member is bound by his oath; that judges in England pass sentence, and reserve the point disputed for the 12 judges; should the member after this explanation remain *obstinate,* he is to be put in *arrest* and reported to the Commander-in-chief, who will in that case, take the most serious notice of what would, after this explanation, be pertinacious breach of duty."

11. *Modern authorities.* The modern authorities require the acquitting member, or members, to vote—Sir C. Morgan says, the "*number* of the members who have acquitted him are always counted in *favor* of the prisoner." I will suppose a case sentence of death. There must be nine out of

(51) G. O. C. C. 13th Nov. (K. T. 3rd Oct.) 1832.

(52) G. O. C. C. 1st Feb. (K. T. 21st Jan.) 1831.

(53) G. O. C. C. 11th May, 1819.

(54) Lr. M. S. to Lord Hastings (No. 4114, 26th March, 1819).

thirteen, or two-thirds, or such a sentence cannot be passed. If Sir C. M. means that the acquitting member should not be compelled to vote a sentence of death, it may be very correct; but he will vote, say, imprisonment. Now in a sentence of imprisonment, say, of six months; that seven vote 12, and six vote six months, the 14th or acquitting member, by voting from one to six months, saves the prisoner six months, as the seven who vote twelve months will not carry their award.

12. Rule Proposed. That all members, acquitting, as well as convicting, must vote as to the sentence. The majority binds the minority. If the members are both jurors, and judges, the juror and judge who does not vote as to *a sentence*, ceases to be a *judge*, and in the case supposed, the 13 members had clearly found the prisoner guilty, and the acquitting member more severely punishes him. Now, how can the acquitting member be counted in the prisoner's favor in this case but by joining the minority, and by voting *a* punishment of some kind: therefore, *counting* in favor and *voting* in favor, are the same thing, it must be, almost always, in favor of mercy.

Adjourn and Time to consider of Verdict, &c.

1. There seems no doubt that a court-martial may adjourn to consider of their *finding* as well as *sentence*. On the trial of Admiral Mathews, vice Admiral Lestock, Capt. Burrish, and five other Captains relating to their conduct in an engagement with the combined fleets of France and Spain, 1745, the following query was put to counsel (55): "Can the court legally defer passing sentence upon *Captain Burrish*, till they had gone through the whole evidence relating to *all* the accused officers; and if they can, and should so defer it, can they consider the evidence given at the ensuing trials as in any manner affecting *Capt. Burrish*, and admit the same to have any weight in the forming their judgment and sentence upon his conduct?"

(55) Messrs. G. Paul, W. Strahan, and G. Lee.

2. *Answer.* "We have considered this question, and are of opinion that there is no law which prohibits a court-martial from *giving time to give a sentence;* but we apprehend it to be most proper, and most agreeable to practice, to give a sentence upon a trial for a capital offence, before the court proceeds to any other trial, for offences of the *like nature.*" "And we are very clearly of opinion, that they cannot consider the evidence given at any *ensuing or preceding* trial, as in any manner affecting *Capt. Burrish,* and that they cannot by law admit such evidence to have any weight in forming their judgment, and giving sentence upon him" (56).

3. On the trial of the late Lieut. Col. Hunter, at Meerut, (57) the court-martial took three days to read over the proceedings, and to deliberate. Juries do not separate till they have given their verdict; courts-martial do adjourn, and meet again, and for more than one day before they determine upon their finding. Judges often postpone their judgment for several days, and even consult the other judges of their court, or all the judges upon points of law. And courts-martial must, at times, do so; and have done so. Except in cases of murder, it is usual to pass sentence at the end of each session.

Sentence may be Death without prescribing the manner of the Execution.

In the case of the Barrackpoor mutineers, the sentence was, "And sentences each to suffer death, in such manner, and at such time, as H. E. the Commander-in-chief shall be pleased to direct." The Commander-in-chief ordered them "to be hanged by the neck until they are dead" (58). As the Mutiny Act and Articles of War do not prescribe in what manner a sentence of death is to be carried into execution, it is clear that, though by the custom of War, shooting is the usual mode of its execution; still the court pass a legal

(56) McArthur, vol. i. p. 455.

(57) G. O. C. C. [25th Oct. 1834, the proceedings occupied 1250 pages folio.

(58) G. O. C. C. 3rd Nov. 1824.

sentence, in military cases, by awarding a prisoner to "suffer death" in the above manner.

Sentences of Imprisonment.

In the navy it is declared by act of Parliament, that "No person convicted of any offence shall by the sentence of any court-martial be adjudged to be imprisoned for a longer term than the space of *two* years" (59). By the Mutiny Act and Articles of War for the army, no time is fixed for any court-martial, except *Regimental* courts-martial. With regard to *district* or *garrison* courts-martial, there even is a *circular* addressed to general officers commanding divisions, &c. pointing out a limited period of imprisonment, solitary or otherwise. It is to be wished some limit was prescribed by the Mutiny Act and Articles of War, for *all* courts-martial.

Unanimous as to Finding or Sentence.

1. *Sullivan* (60) says, "In the sentence, however, care should be had at all times to omit the word *unanimous;* for though it undoubtedly sounds in favor of a prisoner, should he be acquitted, it certainly violates the obligation of the oath taken by each member at the formation of the court which particularly enjoins them not to *disclose* the vote or opinion of each other." *Delafons* (61) says, "The word *unanimous*, (so frequently used, in drawing out the sentences of Naval courts-martial,) which has been held by many to be an encroachment on the letter of the oath, as by disclosing the opinion of the *whole* court, it likewise discovers the vote of every *individual* member. But it certainly cannot infringe on the spirit of the oath, which is calculated to prevent exceptions and disputes, arising from the knowledge of the opinion and vote of any particular member, which, being divulged to the public at large, might occasion rancour and broils, and subject him to insult, or quarrels, from the person who was tried. If in this case exceptions are taken to the members, it must be to the *whole* court, and not to any sepa-

(59) McArthur, vol. 1, p. 337.
(60) Page 78.
(61) Page 248.

rate member, as the partiality or hardship of the judgment (if any is supposed) must be attributed to the whole; and it is as impossible to select any individual, when the word *unanimous* is inserted, as when it is stated in the sentence, that the court is of opinion, &c. &c."

2. In the case of Admiral Byng (62) the court, it is stated, "Do therefore hereby *unanimously* adjudge the said Admiral John Byng to be shot to death;" and, for reasons given "Do therefore *unanimously* think it their duty, most earnestly to recommend him as a proper object of mercy." *Adye* (63) says, "It may often happen that the court is unanimous, both in their opinion concerning the guilt of the prisoner, and the judgment passed on him, but the J. A. in registering such opinion and sentence, is by no means authorised to insert the word *unanimous;* on the contrary, he is absolutely sworn not to divulge the vote of any particular member, whereas by the insertion thereof he would disclose that of every one; but where there is a diversity of opinions, it is necessary that he retain private *memoranda* of those of every individual, that he may be prepared to give evidence thereof, as a witness, to a court of justice, in due course of law, as his oath expresses."

3. The Author of the Military Law of England (64) says, "In the sentence, however, great consideration should be used previous to the insertion of the words '*unanimously,*' in respect to the opinion of the court, '*honorably*' acquitted, &c. Not that these terms, so satisfactory to the persons to whose cases they are applied, are by any means prescribed; but that they have been, occasionally, held as violating the oath of the court, or censuring the authors of a prosecution, in which, perhaps, though the prisoner was innocent, his innocence could not, by any other means, have appeared." *Tytler* (65) says, "It is evidently not proper that the sentence of the court-martial should express by what majority of the members it has been pronounced; because that might lead to the discovery of particular votes or opinions;

(62) Ibid, p. 293.
(63) Page 194.
(64) Page 138.
(65) Page 324.

nor although the court be *unanimous* in its judgment, is it proper to express that circumstance in the *sentence;* for this in fact is disclosing the votes and opinions of *all* the members; yet there seems to be no impropriety if there should be a *unanimous* concurrence of the members for a *recommendation* to the mercy of the sovereign, that this circumstance should therein be mentioned, as giving the greater weight to the application, and at the same time not leading to any discovery of particular opinions respecting the sentence itself by which the prisoner has been condemned."

4. *Simmons* (66) says, "It is scarcely necessary to observe, that as the concealment of the opinion of each particular member is provided for by an oath, specially framed for the purpose, it would be highly reprehensible to make public the opinion of all by recording that the finding was the result of *unanimity.*" The majority of the writers on Military Law are certainly against the use of the word *unanimous* as applied to a *sentence of guilt.* Now, with respect to a jury *all* must agree, and at all events the opinion of each juror becomes known. It may be said the jurors separate, and are unknown to the prisoner, in the same manner as the members of a court-martial who belong to the same regiment or station, &c.

5. The object in concealing the vote or opinion of any particular member, is clearly to prevent the animosities and quarrels which such a knowledge might, in many cases, occasion. But though it may be desirable where *guilt* has been found not to use the word *unanimous* in the sentence, I can see no objection to the use of the word in an *acquittal,* or *recommendation.* As to the censure which an acquittal may (as the Author of the Military Law of England alludes to), convey as to the conduct of a prosecutor, the same censure (though less in degree) arises from the use of the words "*not guilty and acquitted.*" I do not see how can it be said that the members or J. Advocate's oath are affected by the use of the word *unanimous.*

(66) Page 213.

6. My object is to aid the administration of justice by allowing the Commander-in-chief to know, precisely, the number out of thirteen, &c. officers composing a General court-martial who vote the prisoner "guilty" or "not guilty." The punishment may be remitted, or mitigated, in proportion to such knowledge, sometimes. But all hinges on the finding. The Commander-in-chief would, perhaps, be more inclined to mitigate a sentence where the conviction was by a bare majority, or by seven out of thirteen, than if the thirteen all found the prisoner guilty. So much so that all who recommend to mercy sign, at least usually do, the recommendation.

7. Rule Proposed. I would recommend that where the prisoner is found *guilty* that the court should not use the word *unanimous* in their sentence; but that the Judge Advocate should transmit on a sheet of paper, the numbers convicting and acquitting, or if the whole convict state such in writing for the information of the Commander-in-chief. It might be sent sealed and directed to the Commander-in-chief, to be destroyed by him after he has affixed his confirmation (67). In all cases of acquittal, or of a recommendation to mercy, if unanimous, it should be publicly known, for thus the acquittal becomes morally and legally of greater importance, than when, perhaps, a doubting member (perhaps, the president) votes in the prisoner's favor. My object is to make a good use of the knowledge of the number

(67) Delafons, p. 279, says, "the word '*unanimous*' is frequently inserted in sentences of *acquittal,* in order to give greater energy and weight in restoring the officer to the good opinion of his country, and efface the stain, or tarnish, his reputation might have suffered from the accusation brought against him ; from which, he is *honorably* acquitted. This was the case in *Admiral Keppel's* sentence of acquittal, in the year 1779. Although, therefore, the members of a court-martial may sometimes be *unanimous* in their votes and opinion to *condemn* a prisoner as well as to *acquit,* yet that word is seldom inserted in the *former* instance ; as there is not that strength of expression required to add force to a judgment of condemnation as is necessary in one of acquittal : however, the word *unanimous* was used in the sentence by which Admiral Mathews was cashiered in the year 1746."

convicting; but to prevent the prisoner knowing the fact. In an *acquittal* he has a *moral* right to know that, against which there can be no *legal* objection. Alter the Judge Advocate's oath to such an extent, if deemed requisite.

Recommendation to Mercy.

1. *Tytler* (68) says, "There seems no impropriety if there should be a *unanimous* concurrence of the members for a recommendation to the mercy of the sovereign, that this circumstance should therein be mentioned, as giving greater weight to the application.' *Sir C. Morgan* in his note to this passage observes—" The recommendation should always be written under the sentence, together with the signatures of the several members so recommending." Now, if they were *unanimous* they should, by this rule, *all* sign and either way it may become known. Except that the fact may be concealed by the president only signing, or the list containing all the names of those recommending on a separate sheet would answer.

2. *McNaghten* (69) says, "I can perceive many objections to a practice which partially exists (for it is not by any means general), of making *all* members who concur in it, sign any recommendation to mercy, which they may attach to their proceedings. It used to be a common practice to include such recommendations in the body of the sentence; but this is now abolished, and its inconsistence was so glaring that its ever having obtained in any degree is wonderful. The recommendation, &c. should be introduced after the finding and sentence are closed and authenticated; but the absurdity of signing a favorable recommendation must be manifest; as, at any rate, if the signatures of the president and Judge Advocate are held sufficient to authenticate the verdict and sentence, with much stronger reason should they be deemed ample *testimony* of the *truth* of the recommendation. If there be no dissenting members, the word '*unanimous*' will give the petitioned authority the necessary in-

(68) Page 324. (69) Page 163.

formation. If only a *majority* concur in the measure, the terms 'the court,' &c. will denote that, &c. And lastly, if only a *minority* are for it, I would put it to the judgment of every officer whether it had better not be entirely omitted" (70).

3. *Kennedy* (71) makes the président, alone, to sign the recommendation. *Simmons* (72) says, "Such recommendation, when the punishment is discretionary, ought not to be embodied in the proceedings, but appended under the signature of the president; and either signed by him, or by *each* individual member desiring a favorable consideration of the prisoner's case; or the recommendation may be conveyed in a letter from the president, and accompany the proceedings" (73). He adds, (74) "Where the punishment is not discretionary with the court, a recommendation to mercy may be inserted with the sentence; if the motives which actuate the court be at all referred to, the allusion should be brief and incidental. Where the recommendation is not inserted with the sentence, the reasons which prompted the court to recommend the prisoner should be distinctly and fully set forth; but the court should carefully avoid to point out to H. M. 'any particular mode in which the prisoner may be deemed worthy the royal clemency'" (75).

(70) Capt. McN. does not appear to perceive that the object of *all* who recommend signing is, that the number may be known and not "in testimony of the *truth* of the recommendation." Again, a *majority* must concur; for as no act of the court is legal by the act of the *minority*, so 6 out of 13 cannot carry a recommendation. But, if they could, what weight could 6 have against 7; would any Comr.-in-chief pay a moment's attention to such a recommendation?

(71) Page 334.

(72) Page 319.

(73) Sir C. Morgan, note to Tytler, p. 324, observes, "should always be written under the sentence, &c. for it is very possible, that a detached paper may be lost, mislaid, or forgotten."

(74) Page 320.

(75) Simmons, quotes the case in which H. M. observed "the prevalence of such recommendations by courts-martial, in the body of their proceedings, *where the sentence is discretionary with the court*, is not only irregular in itself, but most embarrassing to the sovereign, who is alone

4. Rule Proposed. That a recommendation to mercy by any court-martial, requires a majority of the court to concur therein. That where the whole court concur, the word "*unanimously*" may be expressed therein. That if less than the whole concur the number concurring shall be expressed thus: "12, 11, 10, 9, 8, 7 out of 13 officers concur in the above recommendation," to be signed by the president (76). That the recommendation in *all* cases be written below the sentence; leaving space between it and the sentence, for the confirmation or otherwise of the sentence. This is ordered for the *Bengal* army.

to judge whether the circumstances of a case, when considered with the general good of the service, can admit the exercise of mercy in the confirmation of a sentence."

(76) The recommendation to mercy in the case of *Adml. Byng*, was included in the sentence, the president signed *first*, and the junior member *last*. *Delafons*, p. 293—"In the Navy the president and members, all sign the sentence."

CHAPTER II.

PRECEDENTS.

A.

Account-Book (printed) of soldiers, evidence in favor of a soldier's services. G. O. C. C. 27th (K. T. 25th) Oct. 1836.

Act Criminal for the East Indies, (9 Geo. IV. c. 74)—Mr. Advocate General Pearson (Calcutta) of opinion that "Courts-martial at this Presidency have been considered as courts of justice within Mr. Peel's act." (Ans. to J. A. G.'s Lr. No. 2688, 25th July, 1831.)

Address—On any point should be in writing as, observed by a J. A. "The court may, perhaps, lose some part of what is offered to it." The court ordered all addresses to be in writing. Trial of Capt. Blake, 47th N. I. p. 198. (G. O. C. C. 1st December, 1832.)

Adjournment—May be by letter from the president when he is prevented from attending. Capt. O'Hanlon's trial, (G. O. C. C. 23rd Oct. 1835.)

Adjutant of the Day—If sick and unable to attend, should send a medical certificate. (G. O. C. C. K. T. 20th April, 1831.)

Army Agents—Have refused to furnish information regarding off-reckonings, observing, "as we should not be justified in furnishing a copy of the accounts of any person who entrusted his concerns to our care; without his sanction." Trial of Col. Burgoyne, in Ireland, p. 81, Appx. No. 3.)

Alien Law—Does not apply to India—so decided in the

famous General Martin case—(Judgment of the Lords of the Judicial Committee of the Privy Council delivered by Lord Brougham on 22nd Feb. 1837.)

APPEAL—From a detachment to a general court, in the case of Gunner John Lowe, 2nd Co. 1st Bn. Artillery. (G. O. C. C. 8th Jan. 1821.)

APPROVAL—In the case of a king's officer tried in Bengal, the Commander-in-chief in India having left India, the proceedings are sent to the Commander-in-chief at Madras (or senior king's officer in India)—trial of Lieut. Col. W. H. Dennie, C. B. H. M.'s 13th Lt. Infy. (G. O. C. C. 28th (K. T. 15th) July, 1836.)

ASSAM—Commissioner has civil and criminal jurisdiction. Regn. XX. of 1822 gives the powers of a judge of circuit within the district inhabited by the Garrow mountaineers; subject to the control of the Sudder Nizamut Adawlut; but exempt from the authority of the code of Regns., except where their principles may be applicable to his proceedings." (Lr. J. A. G.'s O. 1st September, 1828.)

AUCTIONEER—1. By circular No. 823, War Office, 30th December, 1837, the N. C. O., or soldier acting as, may receive commission from £2 to £5 per cent.; according to the greater or less degree of trouble and responsibility, "may be paid to him, and charged in the statement of the accounts of the deceased, annexing the man's receipt for the amount and your certificate that his employment was most beneficial for the estate, &c." *(To Commanding officers of Regts.)*

2. Staff Serjt. Howarth was employed, as auctioneer, to sell the effects of the late Capt. S. and was deficient, said by the J. A. G. (Lr. No. 2055, 11th August, 1829) "to be a *civil*, not a *military*, offence, a breach of trust," and (Lr. No. 2081, 28th August, 1829) "Capt. B. the immediate Commanding officer of Serjt. H., was not exercising his *military* functions, in fulfilling the request of Brigr. L. to obtain from the serjeant his accounts as *auctioneer*. I doubt if he could be convicted of disrespect to Capt. B., if he declined obedience."

B.

Bayonets—(or side arms). Order against soldiers wearing them off duty; to wear the bayonet-belt when dressed in regimentals. (G. O. H. G. 15th November, 1837.)

C.

Cadet—Mr. Henry Medland, 2nd Bn. 21st N. I., was tried in Fort William, and dismissed the service. (8th November, 1813.)

Canteen Fund—Commanding officers of Regts. responsible for any expenditure not in conformity with the regulations. (G. O. C. C. in I. 29th October, 1836.)

Certificate—*(medical)* of witness informal rejected (p. 159), trial of late Lieut. Col. Hunter. (G. O. C. C. 25th October, 1834.)

If prisoner sick, a certificate to be sent; p. 310, *idem.*

Of member sick, certificate to be sent. (G. O. C. C. in I. 20 April, 1831.)

Challenges *of members*—On the trial of Serjeant Simon Johnson, H. M.'s 59th Foot, the prisoner was asked if he had any challenges, he replied "*None,*" but said "I have always understood that not more than *one-third* should be from the corps to which the prisoner belongs. *Court* decided the objection to be insufficient; of thirteen there were seven officers from his Regt. *(Appeal,* G. O. C. C. 3rd (K. T. 3rd), April, 1822.)

By Atty. General of those jurors related to the deceased. (Celebrated trials, vol. v. 129.)

By prisoner, and afterwards by crown. (Celebrated trials, vol. ii. p. 297.)

Character *of prisoner*—Where an officer calls witnesses to character, such persons not being gentlemen, the J. A., or court may inquire as to their situation in life, &c., as was done in the case of Lieut. P. Dick, 47th N. I. (G. O. C. C. 6th Feb. 1835.)

The character of a prisoner may be inquired into after recording previous convictions, as was done in the case of

Private Peter Day, 44th Foot. (G. O. C. C. K. T. 27th October, 1834.)

Documents regarding the character of an officer tried have been sent by him to the president, by whom they have been transmitted to the J. A. G. after the court had closed and transmitted their proceedings. Case of Capt. Foord, late Paymaster, 16th Foot. (G. O. C. C. K. T. 8th Aug. 1836.)

CHARGES, *additional by Court.* Where a prisoner obtained leave to quit the court and did not return, an additional charge was ordered by court, "for having gone to *Dum-Dum*" (having temporary leave to leave the court). *Court* opened, and proceed to hear evidence on this charge. Mr. Hospital steward J. W. Tibbets, tried in Fort William. (G. O. C. C. 1st February, 1831.)

Charges defective—Where charges were defective, the J. A. G. recommended the court to adjourn; which they did accordingly. Trial of Lieut. Col. (afterwards Sir) Geo. Wood, 1st Bn. 19th N. I., Fort William, 21st October, 1802. (G. O. Capt. Genl. (Wellesley) 22nd November, 1802.)

CHILDREN *(female) abusing*—There have been several cases of men trying to have connexion with girls under the age of ten years, (indeed under the age of seven years.) In all such cases there should be a court of inquiry, and a report made, before trial, that the girl is capable of being examined on oath; for as observed by the J. A. on one trial—"It having been declared by the twelve judges that no *hearsay evidence* can be given of the declarations of an infant, who hath not capacity to be sworn; and having no other evidence to produce, I declare the prosecution closed; and call upon the prisoner for his defence." The court had been adjourned for the J. A. G.'s opinion, who in reply to the J. A. observed (Lr. No. 1321, J. A. G. O. 28th Oct. 1836), that the court must proceed with the trial,—"the prisoner having *pleaded*, being entitled to the judgment of the court; which, in the circumstances you report must obviously be an acquittal." These cases are *seldom* published to the army: and *never* should be.

CLUBS. *Laws, regarding*—Sir W. Follett, Solr. Genl. is

of opinion that money cannot be voted by *two-thirds*, or by any *majority*, for purposes not connected with the affairs of the club, (*U. S. Club*). A majority had voted £300 to build churches; the *minority* objected—overruled. All must agree. (Bengal Hurkaru, 30th Sept. 1837.)

COMMANDING OFFICERS—1. The Commander-in-chief has observed in one case "There exists a practice in the *Bengal* army, which H. E., would be very glad greatly to diminish: a practice much developed in the case of Lieut. Geils, 60th Regt., as it has been in very many others which have come before the Commander-in-chief. The practice he alludes to, is that of Commanding officers having recourse to written and official communications, through their Adjt., to the junior officers, upon the most trivial occasions."

2. "The Commanding officer and his juniors appear as if they were always standing on the defensive, one against the other; and their relative feelings seem to be quite different from those to which H. E. was accustomed when he was a Commanding officer."

3. "He cannot see any reason why this should be so; or why, on ordinary occasions, a Comg. officer should not call before him, an officer whose conduct is unsatisfactory, and make known his disapprobation, by word of mouth, to the party concerned; without commencing a correspondence through the Adjt., and thereby making others acquainted with, and witnesses to, the errors of one of the parties; when no such exposure seems necessary."

4. "H. E. is of course aware, that cases will occur where such correspondence is indispensable; but many have come before him in which he is persuaded that *harmony*, and even *discipline*, would have been much better maintained by abstaining from the official correspondence alluded to. 'He requests that officers at the head of Regts. will pay attention to what he has said on this subject.'"

COMRADES *dislike to give evidence against each other*—The Duke of Wellington observes in a letter, (6th March, 1810,) to C. Stuart, Esq. regarding crimes committed in Portugal—"One of them (causes) undoubtedly is, the disinclination of

the people of this country to substantiate upon oath, before a court-martial, their complaints of the conduct of the soldiers, without which it is well known that it is impossible for me to punish them: the consequence is, that the criminals are tried, and acquitted for want of evidence; *for it is in vain to expect evidence of an outrage from the comrades of the soldier who has committed it.*" (Despatches, by Gurwood, vol. v. p. 530.)

CONDUCT *unbecoming the character of an officer and a gentleman*—Where an officer said that "debts contracted, unaccompanied by fraudulent, or false, pretences, or under condition of payment on a certain day, did not render it a military crime, or unbecoming the character of an officer and a gentleman, or bring it within article 70th of the Articles of War (all crimes not capital, &c.) nor could he find in the M. A. or Articles of War, any offence described as 'conduct tending to lower the character of *British officers* in the opinion of the *Natives*, and that the conduct of an officer in *private* life, is most certainly *not* subject to control by *military* jurisdiction;" the J. A. G. observed, that "Although the accusation has arisen out of a suit before a *court of requests*, the award of the tribunal can in no way be touched or set aside in a pecuniary or *civil* point of view by the present proceedings, which must necessarily have sole and undivided reference to the *means* by which that suit was *defended*, as far as the *honor* and *character* of a British officer and gentleman are thereby involved" (*making false receipts*). The Commander-in-chief in India (*Genl. Sir H. Fane, &c.*) remarked that—"It is to be hoped that such opinions are not very current amongst the officers of the army in India: *every* act unbecoming the character of an officer and a gentleman, *is* a proper subject of a military charge. He is much mistaken, who dreams that he may run into debt beyond his means for making re-payment, and may leave his station while under such circumstances, and thus occasion his own name and that of his Regt. to become topics for scandal and reprobation; without his becoming fully amenable to military jurisdiction, and liable to punish-

ment." Case of Lieut. and B. Capt. Mackenzie, 2nd or Queen's Regt. of Foot. (G. O. C. C. in I. K. T. 9th Nov. 1836.)

Conduct of junior to his Commanding officer. The Duke of Wellington, in a letter to an officer, (18th Aug. 1811,) observes—"It appears that you imagine that you have reason to complain of an *order* issued by your Commanding officer, Major Genl. C.*, and you have remonstrated upon this order. I put out of the question, for the present, the consideration of the justice or injustice of this order, or whether you had ground, or otherwise, to remonstrate, as bearing in no manner upon the case. It is obvious that if you address your *superior* officer upon *any* subject, you must make use of respectful terms, and must avoid the use of those which are offensive. This necessity exists in the common intercourse of life, in which nothing offensive is tolerated, either by the rules of society or by the law; much less is any thing offensive allowed in the intercourse among military men, particularly in the communications of an officer, of whatever rank, to his Comg. officer, *(totally destitute of foundation*" and "*that it is the reverse of what has been stated,*" and "*if* allowed to remain on record, it will be a *gross injustice to yourself* and the Regt.) I would also observe, that the use of these expressions was entirely unnecessary for the purpose of your remonstrance; your legitimate object in that remonstrance was to show Major Genl. C.—that he was mistaken, and that his order ought not to have referred to the — Regt.; you were to effect this object by the papers which you enclosed, and to add your *comment* upon these papers was not necessary for your purpose; but when those comments were conveyed in offensive terms, it would appear that they were added only for the purpose of offending. On this ground I am most anxious that you should not appear before a Genl. court-martial on such a subject." (Despatches, by Gurwood, vol. viii. pp. 199, 200.)

CONFESSION—As observed by Lord Bacon, "and certainly confession, as it is the strongest foundation of justice; so it

* Appears to have been the Comg. officer of — Regt.

is a kind of corner-stone, whereupon justice and mercy may meet." (Vol. iv. p. 457.)

Confession before trial—Thurtell and Hunt were tried, at Hertford, for the murder of Mr. Weare, January, 1824; they were found guilty; Thurtell was executed; but Hunt, in consequence of the pledge made before his confession, was sent to the Hulks at Woolwich, and afterwards to N. S. Wales. (Celebrated trials, vol. vi. p. 555.)

CONFIRMING AUTHORITY, *(responsible)*—The. Duke of Wellington in a letter to Lieut. Col. Close, (13th June, 1800) adds in a *P. S.*—"I shall be obliged to you if you will desire him (Major C.) to quiet them (the court) by assuring the officers that in case of any irregularity in their sentence, the responsibility for it will rest upon me, who must confirm it; and must order it to be carried into execution." (Despatches, by Gurwood, Supplt. to vols. i. ii. and iii. p. 95.)

CONVICTIONS, PREVIOUS—If the prosecutor be present, he should give them in, and not the J. Advocate; after finding guilty he should say, "You are at liberty *now* to offer any, &c." (Lr. J. A. G. No. 185, Aug. 2nd, 1833.)

Convictions by Supreme Court—In the case of Private Thomas Jones, H. M.'s 31st Regt. tried for *military* crimes, on the 27th March, 1838, at *Dinapoor*—among other convictions—one for a *robbery* committed at *Madras*, and tried there by the supreme court (while he belonged to another Regt.) on the 18th April, 1827, was admitted; the conviction was obtained, through the D. A. G., at Madras, from the Clerk of the crown. (*Confirmed*, G. O. C. C. 17th (K. T. 13th) April, 1838.)

COPY *of Genl. Orders*—Where an officer was tried upon charges arising out of the trial of his Commanding officer on charges exhibited by *such* officer against his superior, the printed G. O. publishing the trial on the Commanding officer, was produced to the court by the J. A. as promulgating the finding and sentence *(reprimand)*. Trial of Capt. J. S. Marshall, 71st N. I. (G. O. C. C. 14th March, 1835.)

CORRESPONDENCE—On the trial of the late Lieut. Col. Hunter, at Meerut, (p. 298) correspondence, not received as

evidence, was allowed to be attached to the proceedings in the Appendix. (G. O. C. C. 25th Oct. 1834.)—See *Conduct.*

CRIMES—1. Military, and non-military, should not be in the same charge. (G. O. C. C. 21st (K. T. 14th) May, 1835.)

2. Committed at *Dinapoor*, tried at Agra by order from the Commander-in-chief. (G. O. C. C. 22nd July, 1836.) Where officers, or soldiers are removed to another division, or district, *Sir C. Morgan*, J. A. G., said, "he does not become amenable to the *latter* for any offence he may have committed in the *former*. A *special* warrant must be issued to bring him to trial." (Note to Tytler, p. 218); but a G. O. answers the same purpose; and saves trouble.

3. *Out of the Provinces*—(Saugor), "All offences, not military, and not under Regn. XX. of 1810, as cognizable by courts-martial, commited by *Native* soldiers, retainers, and camp-followers, at *Saugor*, are cognizable, alone, by the civil power established within that territory by Regn. VI. of 1831. (Lr. J. A. G. No. 369, 28th Dec. 1832). See *Assam.*

4. *Regulations and Orders for the Army*, 1837—1. "No soldier should unnecessarily be brought before a court-martial, and the Commanding officer of a Regt. should be guided in hisdecision upon this point by the character of the individual, his conduct, the nature and degree of the offence, its prevalence at the time in the Regt., and also by the probability of conviction" (p. 248).

2. "There is not any point on which the General Commanding-in-chief is more decided in his opinion, thant hat when officers are earnest and zealous in the discharge of their duty, and competent to their respective stations, a frequent recurrence to punishments will not be necessary" (p. 250).

3. "Too much attention cannot be paid to the *prevention* of crimes. The timely interference of the officer, his personal intercourse and acquaintance with his men (which are sure to be repaid by the soldier's confidence and attachment); and above all, his personal example, are the most efficacious means of preventing military offences" (p. 250).

4. *Desertion*—"Commanding officers of Regts. are not warranted in applying to the Genl. officer Commanding the district, brigade, or garrison, for authority to try *deserters* by *Regimental* courts-martial; it not being intended to include the crime of *desertion* in the description of 'offences which in certain cases may admit of less serious notice,' (see Article of War 85,) and which it may be advisable to try by Regtl. courts-martial" (p. 251).

Cross-examination—1. On Admiral *Keppell's* trial (p. 137), a witness before his cross-examination wished to have his evidence *in chief* read over to him. The court resolved that he should not be allowed.

2. *Cannot enter into new matter*—On Adml. *Keppell's* trial (p. 323), the court resolved that the *prosecutor*, "Has no right, upon the cross-examination of witnesses, to enter into *new matter*; but must confine himself to such facts as have fallen from the witness on his first examination by the *prisoner*. And therefore that the question now standing upon the minutes, is not a proper one."

Council of War—1. From the court of inquiry held on the conduct of Lieut. Genl. Sir *J. Mordaunt*, in 1757, it appears (p. 75) that the instructions were, that "If necessary councils of war of the four principal officers of the *sea* commanders, and an equal number of our principal *land* commanders, including the Commander-in-chief of the sea and land forces, (except in cases of operations by sea or land, only (not conjoint) it not being meant (unless conjoint operations) to have conjoint councils of war)—and all officers to be aiding and assisting, with their advice, when called on. The *majority* of voices shall determine the resolutions; and in case the voices shall happen to be *equal*, the *president* shall have the *casting vote*."

2. *Minutes* by (p. 113) the Council of War. Qn. "Whether it is advisable to land the troops, to attack the forts leading to and upon the mouth of the river *Charente*?"

Yes.	*No.*
Col. Geo. Howard.	Hon. Major Genl. Edward
Capt. Geo. Rodney.	Cornwallis; but afterwards

Rear Adml. Brodrick. acquiesced with the majority.
Rt. Hon. Hen. Seymour Conway.
V. Adml. Knowles.
Sir Jno. Mordaunt, (C. C.)
Sir Ewd. Hawke, (C. C.)

COUNSEL AND ATTORNEY—Are allowed to a prisoner, on application to a court-martial;—case of Major H. D. Coxe, 25th N. I. (G. O. C. C. 27th Dec. 1834); and other cases.

2. *On both sides.* On the trial of Lieut. Bellaris, of the marines, both parties were assisted by professional men (U. S. Gazette, 9th Feb. 1837.)

COURT OF INQUIRY *in favor of the accused made known*—The Duke of Wellington in a letter to Secy. to Government, Bombay, (22nd October, 1803,) writes: "I therefore most anxiously recommend that ample justice should be done to Capt. B., and that if the Hon'ble the Govr. in council should agree in opinion with me upon this subject, he should give orders that a copy of this letter should be published in orders by the Commanding officer in Guzerat." An order was issued by Government stating that an extract of his letter stands after the proceedings of the court of inquiry, which include the other extract to which his observations make reference. (Despatches by Gurwood, vol. 1. pp. 461-2.)

2. *Proceedings of, have been sent with those of the Genl. court-martial.* In the case of Gunners Desmond and Alex. McDonald, 4th Company, 2nd Battalion, Artillery, tried at Kurnal; for "attempting to drown; with intent to murder." (G. O. C. C. 1st Aug. 1836.)

3. *Held regarding a case before a Court of Requests.* It appears from the proceedings of the Genl. court-martial (p. 127) that an officer was examined who had been a member of a court of inquiry held "to investigate some points connected with a suit before the Court of Requests." Case of Lieut. and Bt. Captain Mackenzie, 2nd, or Queen's Regt. of Foot at Bombay. (G. O. C. C. in I. K. T. 9th Nov. 1836.)

4. *Tried for false statements made before.* An officer tried for making a false statement before a court of inquiry; and afterwards denying he had done so. (G. O. C. C. 28th Dec. 1836.)

COURT-MARTIAL—1. "Care is to be taken that the minutes of the proceedings of all courts-martial be fairly and accurately recorded, in a clear and legible hand, without erasures or interlineations; the pages of the minutes are to be numbered, and the sheets (when more than one) are to be stitched together. The General Commanding-in-chief will hold the president responsible for this, and as the minutes in many cases come under his personal inspection, he has thus an opportunity of judging for himself, and his opinion of the zeal and general attention of an officer to his duties will be materially influenced by his strict observance of these instructions." (*Regns. and orders for the army*, 1837, *p.* 246.)

2. *Members not to go on leave, &c. till confirmation.* "Considerable inconvenience having occasionally arisen to the public service, from officers, while members of courts-martial, having been permitted to embark with their regiments, or to go on leave of absence, before the proceedings have been confirmed, the General Commanding-in-chief desires that the officers of the army may be reminded, that they are not competent to apply for leave of absence from their Regts. until the proceedings of the court of which they form a part are finally disposed of. General officers in command will give their particular attention to this subject, and in case of any pressing necessity calling for the services of officers so situated, a reference must be made to the General Commanding-in-chief, through the Adjutant General, if at home, or if on foreign stations, to the General officer commanding, before they are permitted to go beyond the reach of a call for the re-assembling of the court." (*Regns. and orders, p.* 247.)

3. *District courts-martial.* "The proceedings of a district or garrison court-martial, if the Regt. is in Great Britain or Ireland, are to be transmitted to the General officer commanding the district, and the sentence awarded

is in no case to be carried into effect, until it has received his sanction and confirmation. If the Regt. is not under the orders of a General officer, the proceedings are to be transmitted to the Adjt. General, for the approval of the General Commanding-in-chief."

4. "If the Regt. is on a foreign station, the proceedings, in like manner, are to be submitted for the approval and confirmation of the General or other officer vested with authority to confirm the sentence."

5. "The proceedings of general and district or garrison courts-martial, after they have been duly confirmed, are to be transmitted to the J. A. G. in London."

6. "General or other officers in command who have authority to approve and confirm the sentences of courts-martial, are to be very particular in stating, at the end of the proceedings, their determination in each case, and the manner in which the case is disposed of."

7. *Returns.* "The monthly and half-yearly returns of courts-martial, which are required to be rendered by each Regt., and regimental depôt, are intended to afford the means of bringing under view the extent of crime, and the offences most prevalent in every corps." (*Regns. and orders, p.* 247.)

8. *Punishment.* "Just discrimination should be used by the court in applying the quantum of punishment, whether corporal or other, to the nature and degree of the crime, so that its award may be *final* and *carried into effect*; it being indisputable that crimes are more effectually prevented by the *certainty* than the *severity* of punishment, and that decision in the superior will at all times ensure subordination in the inferior."

9. *Locality and Climate.* "The nature and extent of punishment, particularly of *solitary confinement* and hard labor (no hard labor in India), must of course vary according to *locality*, and particularly according to *climate*, as extremes of heat and cold equally prescribe caution. But it is very desirable that these punishments should not be extended too far. *Two* months' *solitary* confinement may

be considered sufficient in most cases, and *six* months' *imprisonment*, with hard labor, equally so. Men sentenced to hard labor at the head-quarters of corps, must be closely confined when not at work, and commanding officers will exercise their discretion with respect to allotting a portion of the period to hard labor and the remainder to drill, thereby keeping up the habits of soldiers, and imposing upon the prisoner the necessity of cleaning his appointments when drilled. During hard labor in barracks, or elsewhere, the men while at work should be kept separate, as much as possible, to prevent conversation, and all communication with them, not absolutely necessary." *(Regns. and orders p.* 249.)

10. *Partial remission of punishment.* "Submission, quiet and orderly conduct, and proof of contrition while undergoing punishment, should, unless the crime has been of a very aggravated character, be favorably considered. In the case of *district* courts-martial, the commanding officer may, if he should see reason, recommend a *partial* remission of the punishment, to the General officer who approved the sentence. In the case of *regimental* courts-martial approved by himself, he has the power of using his own discretion."

11. *Certificate of health—before solitary confinement.* "Courts-martial, before passing sentence of solitary confinement, hard labor, or indeed any other, should ascertain that the sentence can be duly carried into effect. With this view a certificate from a medical officer, of the prisoner's actual state of health, should be required by the court, and attached to the proceedings; and if a public prison is to be resorted to, it is in the power of the court, or of the commanding officer (if by the sentence the decision is left to him, which may in general be advisable), to fix upon that place of imprisonment, the regulations of which appear best calculated to answer the object of the court." *(Regns. and orders, p.* 250.)

12. *Corporal punishment,* (until further orders.) "May be applied to the following offences only:"

1st. "Mutiny, insubordination, and violence, or using or offering violence to superior officers."

2nd. "Drunkenness on duty."

3rd. "Sale of, or making away with arms, ammunition, accoutrements, or necessaries; stealing from comrades; or other disgraceful conduct."

13. *Medical officer.* "No punishment is to be inflicted but in the presence of the surgeon, or of the assistant surgeon, in case of any other indispensable duty preventing the attendance of the surgeon.

14. *No second infliction.* "The infliction of corporal punishment a second time under one and the same sentence, is illegal. The culprit is, therefore, to be considered as having expiated his offence when he shall have undergone, *at one time*, as much of the corporal punishment to which he has been sentenced, as, in the opinion of the medical officer in attendance, he has been able to bear."

15. *Deserters.* "The operation of marking a deserter with the letter D (in terms of the 11th clause of the mutiny act) is invariably to be performed under the personal superintendence of a medical officer." *(Regns. and orders, p.* 252.) The circular, War Office, 8th April, 1829, directs General officers to require, (in the case of a *district* court-martial,) of the court, their reasons for not sentencing the prisoner to be marked with the letter D: but in *India* it is not the custom to add this punishment.

16. *Date of confirmation of district courts-martial.* Ordered by Cir., No. 642, A. G. H. M.'s Forces, 11th June, 1832. Required to be noticed in the monthly returns of courts-martial. The same should be done with regard to *Regtl.* courts-martial: as the sentence is reckoned from the date of confirmation.

Court of Requests, *(Insolvent.)*—1. In the matter of —— Becher, where the insolvent, an officer in the army, had been directed to pay *one-third* of his pay and allowances to his assignee, and he urged his inability to comply with the court's order, alleging that "the paymaster had deducted, and is deducting *one-half* of his pay, to satisfy decrees of a *military* court of request, although the debts for which the decrees were made, had been inserted in his *schedule.*" An

application was made for an attachment against Lieut. B. The court took time to consider. "Mr. Justice *Malkin* now pronounced his decision, that the deduction by the paymaster is *illegal;* the decrees of the *military* court having *no* effect *after* the insolvency." (Supreme Court, Calcutta, 24th June, 1837.) (Englishman, 26th June.)

2. *Pensioned Officers.* It has been stated that an officer removed to the pension establishment is wholly independent of military law. "The military pay and allowances from which the deductions by the military court of requests were ordered, having ceased; Mr. L. cannot pay from what he does not possess; and a *civil* court alone can now affect his property from pension or estate." (Lr. J. A. G. O. No. 253, to A. G. 17th Oct. 1833.) I apprehend, that, as to *debts,* he would be amenable to the military courts of requests, under the following words of section 57, of 4 Geo. 4, c. 81—"or other persons amenable to the provisions of this act, *or resident within the limits of a military cantonment, shall be cognizable before a court of requests composed of Mily. officers and not elsewhere.*" And I apprehend that even the debts of a *civil servant* of Govt. can be brought before such courts (those of *merchants* are); the object in using the words "*or resident within,* &c." being, I conceive, intended to make those amenable, who live under the protection of a military cantonment; and to protect sutlers and merchants supplying the troops, &c. See *Proceedings.*

Court *closed to deliberate*—1. On one occasion the J. A. said in closed court that "yesterday owing to the *doors* not having been *closed* during its discussion, the purport had been made *public,* and spoken of out of court: *court* decided on taking better precautions." (p. 39.) Lieut. Col. Dennie's trial, at Cawnpoor. (G. O. C. C. in I. 28th (K. T. 15th) July, 1836.) In *India* in the *hot* weather when the doors are shut the heat of a room is very oppressive. The only remedy is to have a rope passing through the wall to pull the punkha by.

2. *In cases of trial for an unnatural crime.* "The officiating J. A. G. wrote (Lr. No. 142, 30th March, 1835)

to the Adjt. Genl., that in such cases, the sentence need not be published in G. O.; and the President may forbid the attendance of persons unconnected with the trial," and added: "It would be expedient to recommend to Govt. that he be discharged the service; as was done in the cases of Gunners Shaw and Smith, in July, 1831." At the trial of the prisoner referred to, all unconnected with the trial, were directed to withdraw; and the J. A. had a copy of the above opinion sent to him; which was read to the court, and entered.

3. *Call evidence.* On the trial of an appeal from a *Regtl.* to a *general* court-martial, at Dinapoor, (Serjt. Simon Johnson, 59th Foot,) it is recorded (p. 71)—"Resolution of the court. The appellant having stated facts in his address which, if substantiated, the court consider would affect the validity of the proceedings of the *Regtl.* court-martial, called evidence on those points, and which having established the truth of the assertions, they deem it requisite to submit their proceedings, at this stage, to the opinion of H. E. the most noble the Marquis Hastings, the Commander-in-chief, as to how far the evidence invalidates the proceedings of the Regtl. court-martial." Appeal not sustained. (*G. O. C. C. 3rd April,* 1822.)

4. *Conduct of witness.* It is recorded on one trial (p. 385) (G. O. C. C. 10th Aug. 1822), "the evidence given by witness as affecting the comfort and respectability of Mr. ——, court deem it their duty to send an attested copy of it to H. E. the most noble the Commander-in-chief, with a letter from the president, explanatory of their object in doing so."

Custom—1. On the trial of Major Matthews, for making false musters, and overdrawing in the pay abstracts of the corps he commanded, a question was put the answer to which might criminate absent persons (p. 19); it was recorded that, "the court resolve to receive evidence as to the *prevalence* of any *custom* generally; but not to go into any *particulars.*" (G. O. C. C. 26th Jan. 1820.)

2. *Lord Bacon* said, "where the law appears contrary, usage cannot control law; which doth not at all infringe the

rule of *optima legum interpres consuetudo*; for usage may expound law, though it cannot over-rule law." (*Bacon*, vol. iv. 283.)

D.

Dates—Construction as to, the officer under trial said, (p. 19) "*From* July to the month of Nov. 1831, by common acceptance embraces only the months of Aug., Sept. and Oct., the word '*inclusive*' being always used if meant to include *July* and *Nov*." It is recorded that "the court decide that, 'the months of *July* and *Nov*. are not included.'" (G. O. C. C. 30th Nov. 1832.) To have *excluded* July, the word "*from and after*" in a legal sense, should have been used. From July to Nov. includes July; but not Nov.

Debts *due by others to debtor*—"The debts of officers in the cantonment, are not considered goods according to the act of parliament; that I think the officers cannot be compelled to pay them except to the sutler himself; and that the staff-officer could not give a sufficient acquittance against a future demand from the sutler." (Lr. J. A. G. 30th May, 1829.)

Defence *of same officer on former trial*—1. "Capt. P. O'Hanlon, 1st Cavalry, was tried (G. O. C. C. 23rd Oct. 1835) for publishing in the Meerut Observer, a letter containing false and unwarrantable imputations affecting the characters of Col. Reid and Capt. Scott"—as there was no proof of the publication he was acquitted. He was afterwards tried (G. O. C. C. 31st Dec. 1835) for having been "made officially aware of the publication of a letter, &c. in the newspaper denominated the Meerut Observer of the 23rd April, 1835, which letter was signed '*Pringle O'Hanlon*,' and purported to have been written by him to the Editor of the paper, for the purpose of being laid before the public, and which contained, &c.; and after being so made officially aware of the said letter, Capt. P. O'H. never offered any contradiction to, or disavowal of the same, but allowed the said letter to continue to appear before the army and the public as written by him, Capt. P. O'H., to the great

detriment of the said Col. S. R. (his former commanding officer), and the said Capt. J. A. S— : such conduct being unbecoming the character of an officer and a gentleman, and subversive of military discipline." (Found guilty of conduct unbecoming the character of an *officer* only.)

2. On the second trial (p. 137) the *J. A.* sworn, it is recorded, produced Capt. O'H.'s defence before this court at his late trial (17th Oct. 1835, and subsequent days)—also his observations in reply and the sentence (*finding*) of the court; "the proceedings I hold in my hand are the same which were submitted from this court to the consideration of the Commander-in-chief."

Deserters *transferred to the Navy*—Desertion was very prevalent during the peninsular war; the object being to obtain fresh bounties. The Duke of Wellington writes to Vice Adml. the Hon. G. Berkeley—"Lord Blantyre has written to me to propose to transfer to the *Navy* a boy by the name of John Fraser, who is so prone to desertion, that they cannot keep him with the 42nd Regt. I have sent him to the Provost at Lisbon; and if you have no objection to taking him, I request you to desire Genl. Peacocke to send him on board any ship you please, and I will discharge him from the 42nd." (*Despatches, by Gurwood*, vol. viii. p. 151.) It would be an excellent plan to sentence deserters to serve in the *Navy* as *marines* or *sailors*. It would be a much more disagreeable sentence than that of *transportation*, and save expense to Govt. It would check desertion more than any other punishment.

Discipline, *opinion of N. C. O. as to*—On the trial of Lt. Col. Dennie, H. M.'s 13th Light Infantry, it is recorded (p. 251) regarding the 26*th charge : court* closed—"Another N. C. O. having been brought forward on the part of the prosecution, to give evidence on this charge, the *court* objects to receive further evidence from *N. C. O.*, or *privates* touching *their* opinion of the *discipline* of the Regt. The court will receive any testimony given by *officers*." (G. O. C. C. 28th (K. T. 15th) July, 1836.)

DOUBTS—*Lord Bacon* said, "Mark, whether the doubts that arise, are only in cases not of ordinary experience; or which happen every day. If in the first only, impute it to the frailty of man's foresight, that cannot reach by law to all cases; but, if in the latter, be assured there is a fault in the law." (Bacon, vol. iv. 366.)

DRUNK ON DUTY—1. Capt. Whittam, H. M.'s 3rd Regt. (or Buffs) was tried for being drunk on duty on a particular day. It is recorded on the trial (p. 75)—*defence*, "(question to the Surgeon) Did you feel it your duty to communicate to Capt. W. that his indisposition proceeded generally from his excess in drinking, and that if he expected health he must refrain from it?" *Over-ruled*—"cannot be allowed at this stage of the proceedings; the prisoner's general character and habit not being under examination." (G. O. C. C. 5th (K. T. 2nd) May, 1834.)

2. The rule of law is—"It would not be allowable to shew, on the trial of an indictment, the prisoner has a *general tendency* to commit the *same* kind of offence." (Phillips's Law of Evidence, vol. 1. p. 170.) Where a character is to be given on a trial for such an offence, the prisoner's character for *sobriety* would be of use to him.

DRUNKEN SOLDIERS—In the case of Gunner John French, 3rd Co., 3rd Bn. of artillery, the Commander-in-chief remarked—"In the evidence given before this court, it appears that when the prisoner was before Lieut. B., for examination, on the morning subsequent to his confinement, his appearance was such as to occasion the Lieut. to ask a serjeant whether the prisoner was in a fit state for examination? The serjeant replied, '*perfectly*,' but added, '*he is stupid from the effects of liquor*.' In answer to a question put by the *J. A.* 'Was the prisoner laboring under the influence of liquor?' the Lieut. replied, '*he was sick, but he was perfectly in his senses*.' Now, the appearance of the soldier and his sickness, are facts. The state of his senses but an inference. The Commander-in-chief is therefore of opinion, that the examination of the soldier took place too early after his excess; and that it would have been more

proper had it been deferred till his perfect sobriety was indubitable. The period allowed for such purpose, should never be less than 24 *hours.* Under these circumstances the Commander-in-chief remits twelve months of the punishment awarded (two years) by the court." (G. O. C. C. 16th Jan. 1838.)

DUEL—Lieut. James Keating, and Lieut. P. R. Jennings, H. M.'s 13th Light Infantry, were arraigned as follows: *Charge.* "For conduct unbecoming the character of officers and gentlemen, in a quarrel with Capt. E. C. T. B. Hughes, of artillery, wherein Lieut. K. was principal and Lieut. J. second; in having, on the 15th Oct. 1837, refused to *retract* an insulting expression applied, on the morning of that day, by Lieut. K. to Capt. H., though they ought to have been satisfied by written and verbal assurances from Capt. H., that Lieut. K. was totally mistaken and unwarranted in his suspicions that Capt. H. had acted towards him with caprice and incivility, in consequence of which unjustifiable conduct a duel took place on the evening of the same day, in which Lieut. K. mortally wounded Capt. H."—Guilty, and dismissed from H. M.'s service. (G. O. C. C. 24th (K. T. 22nd) Nov. 1837). The court recommended Lieut. J. to mercy, and he was pardoned.

E.

ESCAPE OF FELON—RETAKEN—Read the record of the conviction by which he became a Felon. (Celebrated trials, vol. iii. p. 387.)

EVIDENCE, *Statement of prosecutor made so*—On the trial of Lieut. Genl. Sir *J. Murray* with *his* consent, Adml. Hallowell who had made a statement, swore to it; the J. A. remarking (p. 194), "As there might be some doubt as to what should appear upon the minutes, I have requested the Admiral to *mark* all such parts of his statement as he meant should be his evidence; and the statement, so marked, has been shewn several days ago to Sir J. Murray; I would merely now request Adml. H., to point out such parts as he

intends to be his evidence, and that will be entered as his evidence, separately upon the proceedings."

Execution of his office, or Duty. *(in the)*—1. It has been observed that, "according to the construction of the Advocate Genl. it would be necessary, in order to satisfy the words of the article '*in the execution of his office,*' that an officer should be, not only *on duty,* but (using the words cited from Capt. Hough, (1825,) p. 86) should 'feel himself called upon to act; give an order; or command anything not to be done.' From this construction, an officer or soldier might stab the Commander-in-chief in his tent without incurring a *capital* punishment." (*Lr. J. A. G. O.* (No. 1751) 16*th Oct.* 1828 to A. G.)

2. In one case (Private Rogers H. M.'s 44th Foot) it was stated, "That a man *asleep,* and without accoutrements, and without any guard under his command, cannot be considered within the meaning and intent of the M. A. 'as in the execution of his office.' The prisoner, a private, at midnight, fired at, with intent to murder Serjeant Clarke, a N. C. O., who was on the night-watch; a specific duty, assumed to embrace the protection of the repose of the soldiers." The J. A. G. denied this doctrine. (J. A. G. O. Lr. No. 2054, 11th Aug. 1829.)

3. The 1st clause M. A. and article 11th of the Articles of War, should include this clause. "Officers, N. C. O., commanding guards, &c. though not under arms at the time the act shall be committed; Commanding officers, Adjutants, Capts. of troops or companies, Capts. or subalterns of the day, Serjt. Majors, orderly Serjts., Serjeants commanding guards, &c. (and all other persons who are considered to be on duty by military usage) shall always be deemed to be on duty while holding such office; and further that if any such superior officer shall be killed, or wounded, while on any such duty, in such a *manner* as would, otherwise, constitute the crime of *murder,* or wounding with intent, &c.—then, and in every such case, the person offending shall be tried by a Genl. court-martial for the crime of *mutiny.*"

4. An officer of H. M.'s 67th Foot, was in 1815, while

in command of the main-guard at Cawnpoor, and while asleep in the guard-room, shot by the sentry on duty, and killed on the spot. The soldier was tried for *murder* by the supreme court (Calcutta). If such a crime were committed *within* 120 miles of Calcutta; the offender would not, now even, be tried by a Genl. court-martial; but if committed at any place *above* 120 miles, he would be. It is proper for the sake of discipline, to make such crimes cognizable by court-martial. See *Mutiny and Mutinous.*

F.

FORFEITURES, *over and above former*—Private John Brann, H. M.'s 13th Light Infantry, tried for being drunk, &c., was sentenced "to be deprived of one penny a day of his pay, over and above any former forfeitures of his liquor money or pay, for a period of two (2) years." (G. O. C. C. 10th (K. T. 7th) July, 1837.)

G.

GARRISON—Where an officer was in the garrison of *Bombay,* the Commander-in-chief addressed the Govr. requesting him "to give directions, that Capt. Mackenzie, (2nd or Queen's Regt. of Foot,) might be ordered up from the garrison, to appear before the court of requests at *Poonah.*" (G. O. C. C. in I. K. T. 9th Nov. 1836*.)

GENERAL COURT MARTIAL—Trial of Gunner John Gregory, Madras horse artillery, tried at Mhow, by a court composed of *Madras* and *Bombay* officers, (three of the former and twelve of the latter.) G. O. C. C. 9th Nov. 1819; and on the trial of the late Cornet Perret, 3rd Bengal cavalry at Prince of Wales' Island, 15th July, 1816, there were eleven of the *Bengal;* two of the *Madras;* and one officer of the *Bombay* army.

H.

HOSPITAL CASE BOOK—The Commander of the Forces observed in the case of Gunner John French, 3rd Co., 3rd

* If a general court-martial were to be held in Fort William, the sanction of the Governor is obtained, *pro forma.*

battalion of artillery—"There is an objection stated in these proceedings to the hospital case-book, being received in evidence. The Major General conceives that it was competent to the medical officer to refer to the book, to establish the case of the prisoner in hospital; and that the book is admissible evidence in the cases of the patients therein recorded." (*G. O. C. F.* 1*st Sept.* 1834.)

I.

Identity—On the trial of Gunner Michael Foran, 2nd Co., 2nd Bn. artillery, a doubt (p. 43) existed as to the manner in which he should be identified by a *native* witness. The court adjourned and a letter was sent to the Magistrate whose reply was next day read to the court. "The *court* decide that the prisoner *(his irons being taken off)* be made to stand amongst a number of other men" *(Europeans)* "and *the* witness be desired to point out *the* person who assaulted *him*. Paunch Cowrie, Gwalla, points out the prisoner from among three Europeans, who are made to stand together in court, all similarly dressed." (G. O. C. C. 28th May, 1835.)

Inquest—Where the jury thought the mother who had killed her daughter was *insane*, the Coroner said *that* was not one of the points of *their* inquiry. *Verdict*, wilful murder by Mrs. Rockliffe, of her daughter Mary Anne, at Hornchurch. (Globe, 25th Oct. 1836.)

Interpreter—See *Judge Advocate*, No. 5.

Irregular Horse—1. It is said—"I have always understood that the irregular horse were exempted from inquiry before courts-martial into *minor offences*, which were always settled in the corps. I conceive all soldiers in the pay of the state amenable to the laws in force for the discipline of its military establishment, unless specially exempted." *(Lr. J. A. G.* (No. 2432) 4*th Oct.* 1830.)

2. It has been remarked that "It is notorious that our system of *corporal punishment* has been the great obstacle to the *Patan* entering our regular cavalry"—personal correc-

tion is in use among them *(irregular horse)* under their own internal arrangement called "*zeerbung*."

3. By G. O. C. C. 21st June, 1837, it is intimated that Government have sanctioned *commissions* being granted to the native officers of the "*local horse*."

J.

Judge Advocate, *wishing a witness not in the list*—1. On the trial of Ensign James Thompson, 67th Foot in Fort William, the J. A. G. (p. 65) "submits that the name of Lt. and Adjt. G. is not in the list of witnesses for the *prosecution;* his evidence will afford material information. Lieut. G. is called by the *prisoner,* but his examination may not afford the J. A., the power of cross-examining him to the particular points on which, it appears from Col. P.'s evidence, he can depose. The *J. A.* submits to the court, whether, for the court's own satisfaction, Lieut. G. should not be called. *Court* determine *J. A.* shall summon Lieut. G. examined (p. 72). Fort William, 11th Sept. 1818.

2. *Producing papers is sworn.* The trial of Captain P. O'Hanlon (G. O. C. C. 31st Dec. 1835); and many other cases.

3. *Defended by Court.* On the trial of Major (afterwards M. G. Sir) J. Macdonald, it is recorded (p. 100), the court enter a remark—"receive the paper which is recorded only that the sense they feel of its gross impropriety may be the more fully manifested. The court are of opinion that the paper is an undeserved attack on the J. A." Fort William, 19th Oct. 1795.

4. *Challenges a member.* Where a member declared that from previous knowledge of the circumstances of the case, "he feels such an insurmountable prejudice in favor of the prisoner, as to make him wish to decline sitting as a member of the court" (no challenge by prisoner): *Court cleared,*—decided that the cause was insufficient; the J. A. recorded, "for the reason assigned by the member, I feel it my duty to challenge the member:" (court cleared). *Court* inform Lieut. A. that they consider the *J. A.'s* cause of challenge

sufficient. Trial of Lieut. Pownall, 2nd Bn. 26th N. I. at Mhow, 4th Sept. 1820.

5. *As to interpreters.* Where the J. A. has a doubt as to the correctness of the interpreter's translation or interpretation, he has so expressed himself—trial of Capt. Blake, 47th N. I. (p. 279), and the court made a minute (p. 282) that the interpreter "to give a faithful, he need not give an exact, literal, translation; but, of course, he must be liable to be called upon to explain, literally, any expression or words which the court, or the parties, may consider not satisfactorily translated. If the interpreter first makes himself master of the questions; the court think he will facilitate his labors." (*G. O. C. C.* 1*st. Dec.* 1832.)

6. *Admissions by.* On the trial of Serjeant Iveson, 2nd Co., 2nd Bn. artillery, the prisoner, before pleading, said (p. 20) he required witnesses now up the country. The J. A. G. recorded, (p. 24) "Having now heard the circumstances to which the prisoner wished to call the *absent* witnesses, I have no hesitation, on the part of the prosecution, in admitting, in full, the facts he expected their evidence to establish. (He then pleaded not guilty.) *G. O. C. C.* 28*th Dec.* 1827.

7. *Plea in bar of trial.* On the trial of the late Cornet Perret, 3rd cavalry, he refused to plead except in bar of trial; six pleas given in and answered by J. A. The pleas detailed the accusation not to be cognizable by military law; *J. A.* said, 1. "Scandalous and infamous conduct was, writing a letter to Mrs. B., the wife of Mr. B. of P. W. Island, written with a view of inducing her to swerve from her duty." 2. "Having in the above letter thrown out unfounded insinuations tending deeply to affect the character of the Rev. Mr. H." At Prince of Wales' Island, 15th July, 1816.

8. *Witnesses.* Names of, to be at the top of each page in margin. (Lr. No. 135, J. A. G. 22nd June, 1833.)

9. *Civil officer.* The J. A. G. wrote, I have submitted to H. E. the Commander-in-chief, that "the J. A. being a *military* man, does not bring him under the articles

of War for acts done in the capacity of *J. A.*, which is a *civil* office." *(Torckler* v. *Palmer.)* Lr. J. A. G. to Advocate Genl. No. 2492½ of 1830.

10. *Paymaster, officiating as.* On the trial of Major J. Anderson, Ceylon Rifle Regt., at Colombo, 10th April, 1837. E. Fugion, Esq., paymaster, H. M.'s 58th Regt. officiated as J. A. *(Ceylon Chronicle, 3rd May,* 1837.*)*

JURISDICTION—1. *Natives of India.* "If Mr. B———, band-master, 16th N. I., is a *native* of *India,* he is not amenable to a *European* court-martial." *(Lr. J. A. G., No.* 193, 13*th Aug.* 1833.*)* The G. O. C. C. 6th July, 1802, by Lord Lake, uses these words, that "All drummers, fifers, and soldiers of every description professing the *Christian* religion, whether born in Europe or in India, and without reference to their parentage, be tried, on any crime of a *military* nature, by courts-*martial* composed of *European* commissioned officers only." The object, clearly, was, that they should be tried by *Christian* and not by *Moosulman* and *Hindoo* officers. The order does not apply the European Articles of War to them—we cannot apply them by intendment—the order is express. The construction by the G. G. of India in council, on the anti-flogging order of Govt. No. 50 of 1835, 24th Feb. 1835, is communicated in a circular from the Adjt. Genl., No. 1714, 20th October, 1837, that "Corporal punishment by the lash is not among the punishments that may be awarded by a court-martial, or inflicted on drummers and musicians attached to *any part of the native army.*"

2. *Pensioned officer.* "Mr. L———, late of 1st N. I., now removed to the pension establishment, is wholly independent of military law." *(Lr. J. A. G. No.* 253, 17*th Oct.* 1833.*)*

M.

MANSLAUGHTER—Section 56 of 9 Geo. iv. c. 74 uses the words "*feloniously* stricken, &c.," as applied to manslaughter. *Gunner N. Carrolan,* 4th Co. 3rd Bn. artillery was charged "with *manslaughter,* in having, &c. feloniously and

wilfully killed, &c." The court found him guilty, with the exception of the words "*feloniously and wilfully.*" The Commander-in-chief disapproved of the proceedings, and remarked: "Because the court, having taken on itself the decision of a question of law, instead of having permitted the exposition of the law given by the D. J. A. G. to guide it, has committed the error of finding the prisoner guilty of manslaughter, with the exception of the words 'feloniously and wilfully,' the first of these words being indispensable to define the crime of manslaughter. Thus the court has affirmed the crime, having abstracted the essence which constituted the crime. If the act was not 'feloniously' done, the crime charged was not committed." (*G. O. C. C. 20th March,* 1838.) In the case of *Bombardier Silke,* artillery invalids, (G. O. C. C. 26th August, 1837,) the court rejected the word "wilfully." Upon which the J. A. G. wrote (Lr. No. 178, 6th Sept. 1837), "there was an inconsistency in rejecting the word 'wilfully;' because an act committed '*feloniously,*' must have been committed *wilfully.*" In the case of *Lieut. P.* (G. O. C. C. 6th Oct. 1837), the court likewise rejected the word "wilfully." By the act referred to, the word "feloniously" is legally required.

MEMBER—1. Lieut. Col J. J. Bird, invalids, Comg. a provincial battalion, was a member on the trial of Major Mathews, 9th N. I. (*G. O. C. C. 26th Jan.* 1820.)

2. *New Member.* If there be a *new* member, he is sworn: but the *old* members need not be resworn. Trial of Ensign Cookney, 26th N. I. (*G. O. C. C. 4th Jan.* 1828.)

3. *Several absent.* The court should adjourn. At a trial in camp before Bhurtpoor, owing to changing ground, the court were reduced from fifteen to nine members. Trial of Capt. Wiggins, 31st N. I. (*G. O. C. C. 18th Feb.* 1826.)

4. *List of, sent to prisoner.* In the case of late Cornet Perret, 3rd Cavalry, tried at Prince of Wales' Island, 15th July, 1816, a list of the officers available there, was sent to him by the Adjt. Genl. (Lr. No. 459, 8th Feb. 1816); hoping he would not, on slight grounds, object to any. See *Courts-martial.*

Mess—"Officers who, from their religious scruples, are unwilling to assemble with their comrades, would do well to consider how far they would not better consult their own happiness by retiring from the Regt., than by serving where, in the discharge of their duties, they must constantly be required to do that to which their feelings are opposed. That officers should absent themselves from mess, and live in their rooms, the *master general* cannot allow. He therefore cautions those who persist in so doing, that they must expect to be selected for detached stations, instead of being permitted to continue in their present quarters, and by their example, lead others to adopt a line of conduct which must be most prejudicial to the service." *(G. O. 14th Nov. 1836, by order of the Master General of the Ordnance.)*

Minute by Court—read to the parties. Trial of late Lieut. Col. J. Hunter, (p. 447 regarding the reply.) G. O. C. C. 25th Oct. 1834; and other cases.

Murder, *judgment deferred*—1. On the trial of *Peerbux* for the murder of *Oajagar*, who was found guilty, his Lordship said that although it was usual to pass sentence immediately, yet in this case he should not do it at this time; the prisoner however would do well to prepare for the worst. It appears that there were some other parties then in custody for this horrid affair, on whom several articles of deceased's property were found; and who will be brought up for trial in the course of the sitting of the court. *(Supreme Court, Calcutta, 2nd August, 1837.)*

2. *Death by Law, but still voted.* On the trial of Private Philip Stapleton, 44th Foot, for murder, the J. A. G. wrote (Lr. No. 2077, 24th Aug. 1829).—"The Commander-in-chief desires the court may be re-assembled, and that, as *Judges*, they may pronounce the *sentence* of the law, on the crime they have found by their verdict as *jurors;* the new statute (9 Geo. iv. c. 74) not having made any alteration in the proceedings of courts-martial." See *Remission of death* under *Pardon.*

Mutiny and Mutinous, *difference between*—1. In the case of Private Edward Byrne, 38th Foot, for *mutinous*

conduct. "Having deliberately entered the room of Asst. Serjeant Major Goold, H. M.'s 38th Regt., in the left wing of the barracks, and *attempting to assassinate* the said A. S. M. Goold, by stabbing him when *asleep* with a bayonet, and having further tried to repeat the stab when seized by the Assistant Serjeant Major."

2. The Advocate General *(Mr. Cutlar Fergusson)* was of opinion that "the 5th article of the 2nd section of the Articles of War (now Article 11th) absolutely requires the person against whom the outrage, contemplated by the enactment, may be committed, to be *bonâ fide* in the execution of his duty, and that however clear the conviction, that the attempt made by *Edward Byrne* upon the life of Asst. Serjt. Major *Goold* arose out of a diabolical feeling of revenge for fancied wrongs, inflicted when in the execution of his (Serjt.'s) duty, and that consequently the outrage was committed against the *office,* rather than against the *individual;* yet that no interpretation can make out that individual to have been in the execution of his duty, at the *time* and in the *situation* in which the attack was made upon him."

3. The Offg. J. A. G. in his letter (No. 743, 25th July, 1823) to the Military Secy. to the Commander-in-chief, observed—"In addition I would beg to offer to H. E.'s consideration, that the words '*in the execution of his duty,*' are not to be found in the charges against *Byrne,* and to submit whether they would not be essentially required to bring him under the peril of the article in question."

4. "Mr. F. thinks that although the provision of the 2nd article of the 24th section of the Articles of War (now article 70th) was certainly meant to apply to offences of a *lighter* nature; it may be considered as applicable to the offence committed by the prisoner; and I therefore respectfully suggest that the court having jurisdiction in the case—the charges containing a *military* offence—the proceedings being regular, and nothing but the sentence erroneous; a *revision* of that sentence appears to be the most advisable course to be pursued under all circumstances." *(G. O. C. C. 26th Sept.* 1823.) See *Execution of his office, &c.*

N.

Neemuch—"Should the offence have been committed in the territories of a foreign power beyond the boundaries of the British cantonment, and, consequently, the limits of your command—the court-martial would have no jurisdiction, *(prisoner the subject of a foreign state)*—the proceedings of the native Genl. court-martial not confirmed." *(Lrs. J. A. G. No.* 130, *18th June, and No.* 240, *30th Sept.* 1833.)

Newspaper—1. The case of *Colonel Vans Kennedy*, publishing a letter in the *Englishman* regarding his removal from office. (J. A. G. Bombay army,) H. E. the Commander-in-chief in India, in conclusion, observes—"On a consideration of the whole published letter, he offers his advice to the army not to follow the examples which Col. V. K. has thought proper thus to lay before them : but rather to profit by them, as affording instances of conduct which should be carefully shunned by all those who desire to prosper in their profession."

2. "The Commander-in-chief cannot conclude, without expressing his decided opinion, that this sort of *exparte* publication, which is calculated (and probably intended) to derogate from the character of a superior officer of the army, and in which the Colonel imputes 'extreme injustice' to some person or persons, is not calculated to do good, or to lead to just conclusions; and, therefore, is little becoming any officer, but more especially one of high rank in the army, whose experience should have taught him better."

3. "H. E. will not fail to make known to the Hon'ble Court of Directors, through the Supreme Government, his view of such proceedings; and how much he deprecates publications which are calculated more to excite dissatisfaction in the army than to do any public service." *(G. O. C. C. in I. 13th Oct.* 1836.)

O.

Oaths; *when to kiss the Bible*—1. On the trial of Patrick Connolly, H. M.'s 13th Light Infantry. The Adjutant

of the Regt., as prosecutor, objected that the members should kiss the Bible after the words, "you shall well and truly try and determine, &c. so help you God," that he had always seen it done *twice* in H. M.'s service. The *J. A.* said that the Bible was kissed only *once*, and after the words "so help *me* God." The *J. A.* reading the previous words "you shall well, &c. so help *you* God," to the members. The court decided in favor of the J. A. (*G. O. C. C.* 21*st* (*K. T.* 18*th*) *June*, 1836). Tytler, p. 230, says, "The words of the *charge* given by the *J. A.* are '*you* shall well, &c. so help *you* God.' The words of the *oath* are '*I* do swear, &c. so help *me* God.'"

2. *Omitted to be recorded.* Where it had been omitted to record that the J. A. and interpreter had been sworn—the J. A. G. wrote to say—"If an omission, to *record*, with the sanction and in the presence of the president, the facts. If the oaths were omitted to notify the same." (*Lr. J. A. G., No.* 330, 9*th Aug.* 1834.)

Objections *by prisoner, &c.*—Should always be recorded. If in offensive language such parts should be expunged.

Officer, *Character of a deceased officer vindicated*—1. The Duke of Wellington, in a letter to the Secy. of Govt. Bombay, 9th Nov. 1803, thus wrote regarding a deceased officer who had been in charge of the commissariat—"Unfortunately for the service, the gentleman against whom these accusations have been made was killed at the battle of *Assye*, otherwise I should not now be obliged to write his defence. This officer was notoriously the most humane and gentle towards the natives of any I have yet seen in this army; indeed, this virtue was carried to an excess in his character, that might almost be termed a fault."

2. "As the officer is killed, his character cannot be entirely cleared from the stigma recorded respecting it, on the authority of the lowest and vilest men in society. But I can safely say, that as far as I can answer for another man, these depositions do not contain one word of the truth: excepting that the deponents deserted from the service." (*Despatches, by Gurwood,* vol. i. p. 495.)

P.

PARDON, *revoked*—1. "The court, in setting aside the first charge, have entertained the erroneous opinion, that a *pardon* once granted cannot be revoked, in which *Major Genl. Wade* cannot agree; as a pardon granted under a certain supposition at the time, by the granter, that the person to whom it is granted is sincere in what he says, and that person feels he receives his pardon solely from the supposed sincerity of his speech; the pardon becomes void, the moment his insincerity is known." (*Trial of Lieut. Fleming, 22nd Foot, Isle of France, 14th March,* 1811.)

2. *Pardon, in felony, not by Commander-in-chief.* In the case of Lieut. W. Y. Torckler, late 4th N. I. tried for "having unlawfully, maliciously, and feloniously, fired a loaded pistol, or two loaded pistols, at Lieut. P. G. of the same Regt., with intent to murder the said Lieut. G." The sentence of the court was "to be hanged." Approved, (signed) Dalhousie, Commander-in-chief. *Remarks.* "Taking into consideration all the circumstances attending the case of this unhappy man, the Commander-in-chief is willing to extend to him the powers of mercy which are entrusted to him, and in that feeling *remits* the sentence pronounced." (*G. O. C. C. 25th March,* 1830). On the 17th Jan. 1831, Lord Dalhousie wrote to the Right Hon'ble Sir J. Beckett, Bart., J. A. G. as follows: "I *remitted* the punishment. It is now understood the *pardon* of *felony,* although the conviction be before a court-martial, does not exist in the Commander-in-chief." In the case of Gunner Samuel Frith, convicted of *murder* and sentenced to be hanged, the Commander-in-chief recorded, "Under the suggestion of the G. G. in C. I *remit* the punishment of *death* awarded and direct, that he be transported beyond the seas, as a felon, for the remainder of his life." (G. O. C. C. 24th August, 1837.)

* PLEA OF GUILTY—1. On the trial of Private James Williams, European Regt. for *desertion,* the J. A. G. said he recommended the prisoner to plead "*guilty.*" "The only

grounds for the advice which is often given to a prisoner to withdraw it rest on the hope that the consequence of an investigation of his conduct might be, the unexpected disclosure of circumstances tending, either to invalidate the testimony adduced in support of the charge, or to extenuate the guilt it implies, in the event of its being substantiated—not in *this* case." *Tried at Fort William,* 1*st April,* 1816.

2. *Paper delivered before Plea.* On the trial of Lieut. Col. Dennie, H. M.'s 13th Light Infantry, he gave in a paper containing seven objections. (*G. O. C. C. in I.* 28*th* (*K T.* 15*th*) *July,* 1836.) And several other cases.

3. *Desertion—Plea, absence without leave.* A gunner tried in Fort William, Thomas Fitz Simmons, 6th May, 1819, and other cases.

4. President dying—*proceedings not signed.* The Duke of Wellington writes to the J. A. G. 4th Nov. 1812, that the "Proceedings had been closed, and after the sentence had been agreed to, and copied fair, but had not been signed by the president (Major Genl. Le Marchant) when he was killed—I desired Lieut. Col. Dalbiac, the next senior officer, to sign in presence of the court; owing to the situation of the army, the court could not then be conveniently assembled; and Lieut. Col. D. being sick, I have now ordered that the proceedings might be signed by Major Gordon the next in seniority to Lieut. Col. D., and requesting J. A. G. to take the pleasure of H. R. H. P. R." (*Despatches, by Gurwood,* vol. ix. p. 530.) The Articles of War should make it "competent to the president or senior officer present, to sign, &c." to provide for the case.

Prisoners—Under sentence of imprisonment march with their regiment; and undergo the remainder of it on arriving at the next, or new, station, &c. The time on the march being counted as part of the sentence. (*G. O. C. C.* 7*th* (*K. T.* 2*nd*), *and* 14*th Nov.* 1835.)

Proceedings *Detachment, court-martial on Warrant officers*—1. "The proceedings of detachment-courts-martial, held on Warrant officers, are to be forwarded by the General officer under whose authority they may have been

held, through the Adjt. Genl.'s department, to be reported to H. E. the Commander-in-chief, in conformity to article xiv. of section 14 of the Articles of War for the Hon'ble Company's army."

2. "The Adjt. Genl. of the army having received the commands of H. E. the Commander-in-chief, will return the proceedings, together with such observations as may have been made, to the General officer under whose orders the court had been held, for the purpose of the sentence being promulgated."

3. "That officer will subsequently cause the proceedings to be returned to the Adjt. Genl. of the army, with a view to their being placed in deposit in his office." (*G. O. C. C.* 16*th Aug.* 1837.)

PROSECUTOR—The circular J. A. G. No. 178, 15th June, 1832, directs "the *J. A.* to submit the expediency, *generally*, of the Commanding officer of the prisoner's Regt. (where the crime is of a general nature) being the prosecutor. On the trial of Gunner D. Collins, 1st Co., 3rd Bn. artillery, it is recorded—Col. F., Commanding 3rd Bn. artillery, *deputes* Lieut. H. A., acting Adjt. of the Bn., to act as prosecutor; and he is present in court for that purpose." (*G. O. C. C.* 6*th Oct.* 1835.) There have been several similar cases, but there is no order to *depute*.

2. *Commander-in-chief, as.* H. E. Lieut. Genl. Sir J. Keane, K. C. B., and G. C. H. Commander-in-chief of the *Bombay* army, was prosecutor on the trial of Bt. Major Jebb, 40th Foot. The proceedings were confirmed by the Right Hon'ble Lord W. C. Bentinck, Commander-in-chief *in India.* (G. O. C. C. in I. K. T. 19th March, 1835.)

3. *Prosecutor sick.* On the trial of the late Lieut. Col. Hunter, the prosecutor (p. 414 Defence) was sick and absent; but the court proceeded without him. (G. O. C. C. 25th Oct. 1834.) And several other cases.

4. *Prisoner objects to prosecutor being in court.* On the trial of Bt. Capt. Kyan, 2nd Cavy., he objected to his Commanding officer remaining in court, during the examination of witnesses—over-ruled. (G. O. C. C. 28th Dec. 1816.)

5. *Adjt. Genl. of a division.* On the trial of the Commanding officer of ——— L. D. the Adjt. Genl. of the 2nd division, was appointed prosecutor, by order of the Duke of Wellington. (Despatches, by Gurwood, vol. ix. p. 613.)

Prosecution—1. *Sick witness absent.* On the trial of Lieut. Col. Hunter, it is recorded (p. 298), "Prosecution closed except the evidence of Lieut. B., 71st N. I. sick. *Defence* begins, and (p. 400) Lieut. B. afterwards examined. (G. O. C. C. 25th Oct. 1834.)

2. *Closed—Prosecutor's address.* On the trial of Capt. Blake, 47th N. I. after the prosecution was closed (p. 370) the prosecutor made (p. 371) a short address. (G. O. C. C. 1st Dec. 1832.)

Q.

Questions—1. The questions to each witness (whether by prosecutor, prisoner, or court) are, usually, numbered 1, 2, 3, &c.; the same course for the defence. If the trial is a short one, it is not usual, nor necessary to do so. In committees before the Houses of Parliament, the questions are numbered from 1 to —— and that is not a fresh numbering for each witness.

2. *Must answer, though liable to Civil action.* The House of Lords on the trial of *Lord Melville,* called upon the judges for their opinion. *Four* were of opinion, that a witness was not compellable to answer any question, the answer to which might subject him to a *civil action:* the *other judges* together with the Lord Chancellor and Lord Eldon, were of the contrary opinion. (6 vol. Parl. Deb. pp. 234, 245) Phillipps on Evid. vol. I. p. 264, note.) *See,* "Private Conversation," *Index.*

3. *De bene esse.* Such questions must be with the *consent* of both parties. They are put to witnesses at a distance; or, who are about to leave the station, &c. (Cir. No. 2485, J. A. G. 22nd Nov. 1830, *by order of Govt.*)

4. *To lay ground for putting.* Where the prisoner, in cross-examination put this question—"Did Mr. O'D—— *then* inform you what provocation he had given to Mr. W.,

and if so, what was it he stated?" (p. 15) *J. A.* Before this question be put, Lieut. O'D., should be asked if he *did* give any such information to the witness. *Qn.* "Did you inform Lieut. S. *that* night?" Trial of Lieut. Whitaker, 16th Foot. (G. O. C. C. 17th (K. T. 7th) July, 1830.)

R.

RE-EXAMINATION—On the trial of Private Wm. Manning, 16th Lancers, Meerut, 8th Feb. 1830 (never published); the *J. A.* insisted on his right to re-examine upon *new* matter elicited by a question put by the court.

REMISSION *of sentence*—In the case of Gunner Samuel Frith, 1st Troop, 1st Brigade H. A. tried for *murder*, it is recorded in G. O. "Under the suggestion of the Right Hon'ble the Gov. Genl. in council, I *remit* the punishment of *death* awarded against Gunner S. F., and direct, that he be transported beyond the seas, as a felon, for the remainder of his life," (*concurred* in by the Gov. Genl. of India in council.) G. O. C. C. 24th Aug. 1837.

REVISION *as to recommendation*—On the trial of Lieut. —— of — Dragoons, the Duke of Wellington, wrote to the president of the Genl. court-martial (15th Sept. 1810), "It is always my wish to attend to the *recommendation* of a Genl. court-martial, but I am desirous that the court should re-consider their recommendation. It appears founded solely on the length of his confinement, which, I must observe, has been in arrest at large. This length of confinement has been owing in a great measure, to Lieut. —— himself, &c." "The extent of the service on which the army is employed, and the difficulty and inconvenience of calling officers from their duty in one part of the army to attend as witnesses upon a trial in another, was the cause of continued delay in bringing Lieut. —— to trial: and I would beg the Genl. court-martial to observe, that if length of confinement is considered and admitted as the ground of recommendation in this instance, it ought in every one, in which the public convenience may render the delay of the trial of an officer necessary." (Despatches, by Gurwood, vol. vi. p. 419.)

S.

SAUGOR—"All offences, not military, and not under Regn. XX. of 1810, as cognizable by court-martial, committed by native soldiers, retainers, and camp-followers, at *Saugor*, are cognizable alone by the *civil power* established within that territory by Regn. VI. of 1831." (Lr. J. A. G. No. 369, 28th Dec. 1832.)

SENTENCE—1. A sepoy of the *Madras* army, for shooting and killing a havildar in the execution of his duty, was sentenced to be hanged, and "further after execution, in order to mark the sense which the court entertains of the atrocity of the prisoner's crime, that his *body be suspended in an iron cage*, on some conspicuous spot in or near the cantonment of Cannanore." *Madras*, 15th Aug. 1836. *Confirmed* by the Commander-in-chief.

2. *Protest against.* On the trial of Lieut. Fast, 59th N. I. five members *protested* against the *revised* sentence. The court consisted of sixteen officers. The protest was illegal—as no minute can be recorded unless the *majority* concur. The sentence was vitiated, owing to the illegal division of the votes. (G. O. C. C. 19th Dec. 1833.)

3. *How remitted.* A sentence, the *Duke* of *Wellington* observed (30*th May*, 1812), should not be—"remitted, to depend upon their future behaviour"—irregular—should have been either punished or pardoned; pardoned if put on duty since their conviction." (Despatches, by Gurwood, vol. ix. p. 193.)

SERVICE *of Cadet*—"Mr. (the late Capt.) Smalpage when appointed a Cadet of *Cavalry*, commenced the service afresh" (formerly in the *Infantry*). His brevet of Captain cancelled. (No. 183 of 1825, G. O. G. G. in C. 17th June, 1825.)

STOPPAGES *for stolen property*—"Mr. Advocate General Pearson is of opinion, that the prisoner's pay cannot be stopped to compensate the loss *(theft)*; but that the actual property identified before the court, should be restored to the owner. (Case of a soldier, or person receiving pay from a public

establishment.) Lr. J. A. G. to Adjt. Genl. No. 2354, 15th July, 1830.

By section 110 of the act 9 Geo. iv. c. 74, restitution of property is directed, if the owner prosecutes to conviction.

T.

TRUST, *breach of*—The J. A. G. writes to the Commander-in-chief—"I apprehend it is equally unquestionable, that a soldier placed on the duty of a guard or sentry, and betraying his *trust* is guilty of a *military* offence; and if a military offence, it is triable before a *military tribunal.*" (Lr. 2382, 30th July, 1830.)

U.

UNNATURAL CRIMES—*Closed court.* The offg. J. A. G. to Adjt. Genl. (Lr. No. 142, 30th March, 1835) wrote that, "the president may forbid the attendance of persons unconnected with the trial; and the sentence need not be published in G. O." The man whose case is referred to was transported for life.

W.

WILLS *of soldiers*—Circular, War Office, 13th Dec. 1837, G. 86,513, "There being reason to believe that the Wills of soldiers dying in hospital are sometimes obtained in favor of their comrades by undue means, I am directed to request that you will give the necessary instructions that, in addition to any other witness, the surgeon, or assistant surgeon shall in every instance, when practicable, be present at the execution of the Wills of soldiers in hospital, and that he affix a declaration to such Wills, stating whether the parties were in a fit state of mind at the time to execute the same."

"I am further instructed to request that whenever a Will not containing such a declaration, shall in future be transmitted to this office, you will annex thereto an explanation of the circumstances, and will withhold all payments at the Regt. arising thereon, until the decision of the Secretary at War be notified."

"The soldiers serving in the Regt. under your command must be apprised of the adoption of these regulations, and their substance must be stated in written, or printed notices to be stuck up in conspicuous places in the different hospitals." (*Hon'ble P. in C. Fort William, 28th May,* 1838.)

WITNESSES—1. *Placed in arrest.* On the trial of Capt. Clarke 77th foot by Genl. court-martial at Glasgow. A witness (*assistant surgeon*) was placed in arrest by the court, for trying, by reports, to create a serious quarrel between the prosecutor and prisoner, and denying them on oath. The court recording, "The reports, if true, must have been learnt in his professional capacity, or in the strictest confidence, which he was bound by every obligation of honor to conceal; has been in the highest degree disgraceful and dishonorable to him. The court feels it its imperative duty to direct, that he should be placed under *arrest,* until the decision of the Genl. Commanding-in-chief shall be made known." (U. S. Journal, No. 87, Feb. 1836, p. 270.) Where a Genl. court-martial conceived that an officer (*witness*) had been guilty of *subornation of perjury,* and placed him in *close arrest,* it was declared to be improper, under article xix. section xiv. (Company's Articles of War regarding (disorders or Riots.) G. O. C. C. *Madras,* 27th June, 1836.)

It is sufficient, generally, to report any misconduct, unless the arrest be imposed, to prevent a breach of the peace, &c.

2. *Witnesses for defence.* "On the trial of Lieut. Col. Dennie, H. M.'s 13th Light Infantry, he gave in a paper requesting the court to order the attendance of his witnesses. The court (p. 34) decided that he should give in a list." (G. O. C. C. in I. 28th (K. T. 15th) July, 1836.)

3. *Wishing to consult J. A. before answering.* On Lieut. Goad's (1st Cavalry) trial, a witness (Lieut. O'H.) said he was, "afraid of answering this question, he might implicate others, but requests to be allowed to ask the *J. A.*, privately, how far, in his opinion it will do so. The *prosecutor* objected—*court,* of opinion that in this particular instance, there is no objection to the witness mentioning privately,

and asking the *J. A.* whether he can answer this particular question without implicating others. The prosecutor protests against this as (without any allusion to the present instance) were it to be allowed to become a *Precedent*, it might be the means of poisoning the source of justice. *J. A.* states that he is not the prosecutor, he knows of no objection to his hearing the circumstances; (it being impossible to make them public,) and stating whether the question can be answered or not without others being implicated." *(G. O. C. C. 13th June,* 1833.)

I think in such a case, the witness might state his doubts to the court being cleared for the purpose—I imagine a witness might communicate such to a judge; and if so, of course, to a court-martial, whose members are judges.

4. *A Brahmin, declines the Ganges water.* On the trial (p. 31) of Capt. J. D. Carroll, 69th foot, it is recorded. "A Brahmin will not take up the '*Ganges water*,' knows *English* sufficiently well to be examined in it." A '*solemn declaration*' being put in by him, and he declaring that he believes in *God* who made all things; he is examined accordingly." (G. O. C. C. 18th (K. T. 11th) July, 1823.)

5. *Wife of wounded person.* i. On the trial of Mr. Cadet H. Medland, 2nd Bn. 21st N. I. "scandalous and infamous conduct, waylaying and wounding Lieut. Sumbolfe, H. M.'s 24th foot," the *J. A. G.* said, "understanding that some of the members entertain doubts regarding the *competency* of *Mrs. Sumbolfe,* I took the precaution of consulting Mr. Strettell, the Advocate General; and I have his authority to declare, that Mrs. S., not being a party to the *record,* or, in other words, the suit having been instituted by the King and not by Mr. S. Mrs. S. is a competent witness" (*sworn.*) G. O. C. C. 8th Nov. 1813.

ii. On the trial of Capt. Alex. Brown, H. C.'s European Regt. the late Major Ferris was the prosecutor, and his wife gave evidence; Capt. B. wished his wife also, to be examined, which was refused. (The Clergyman the injured party, the prosecutor, and the prisoner, were brothers-in-law.) G. O. C. C. 27th Nov. 1820.

iii. Dr. and Mrs. Dodd were travelling together in a post-chaise, he could not speak positively to the *identity* of the robber; she could, was sworn and examined, and the robber condemned. (*Celebrated trials*, vol. iv. 492)

6. *Declining to answer.* On a trial where a witness declined to answer a question (p. 260) the prisoner said, "It is by no means my intention to avail myself of any thing that may be elicited in evidence, to prosecute him (the witness) either before a military, or civil court." (*G. O. C. C. 10th Aug.* 1822.) I would as *J. A*, insure any witness from trial in consequence of any evidence he might give. In the case of *Lord Melville* "a Bill was brought into the house of Lords, to indemnify witnesses from criminal prosecutions and civil process, to which they might be exposed by giving evidence." (Phillipps' law of evidence, vol. i. p. 263 *note.*)

7. *Witness (native) under a fever.* On the trial of Capt. E. C. Browne, 22nd N. I. the *J. A.* said, "The court ought to have objected to his evidence, under the supposition, that it was given, during an illness, which prevented his answering with that correctness he would otherwise have evinced." (*G. O. C. C. 28th Oct.* 1818.)

8. *Witness pardoned.* Pardon produced, and read before examined, (Celebrated trials, vol. v. p. 164.)

9. *Witness out-lawed.* Pardon produced and read before examined, (Celebrated trials, vol. ii. pp. 555, 560, 562.)

10. *Witness's veracity.* Not to be impeached by the production and reading of letters. (G. O. C. C. 20th Nov. 1834.)

Woman's person. If there be any object in examining a woman's person, it should be done by women duly sworn (Celebrated trials, vol. v. 364). If regarding *serious wounds*, of course medical men must be examined.

CHAPTER III.

CHARGES, WITNESSES, &c.

A.

ABSENCE WITHOUT LEAVE—A. B. No. — of — company — regiment placed in arrest, or confinement, and charged as follows.

CHARGE. With having absented himself from his regiment, stationed at ——, without leave, on ——, and not returning till — day of —— 183— (or not returning till seized at ——, or till brought back, a prisoner, by a guard, or escort). The same being in breach of the Articles of War. Station —— day — 183—. By order of Major General C. D. Commanding —— division.

(Signed) E. F. Asst. Adjt. Genl.
—— Division

2nd Charge. With having lost, sold, or made away with the following articles of Regtl. necessaries, *viz.* (named).

WITNESSES. The orderly serjeant of the company, to prove that he had not leave—his absence as charged, and return. Examine serjeant of the guard to whom made over as prisoner. If he was in hospital, the hospital serjeant. The pay serjeant to prove the deficiency as to Regtl. necessaries.

SENTENCE. Discretionary. See Articles of War, 70, 79 and 81. No corporal punishment in H. M.'s Service for this crime. *Honorable Company's* Articles of War section vi. article vi., *stoppages* not exceeding 2-3rds (in H. M.'s) of his daily pay, and H. C. service section xi. Art. iii. not exceeding half of his weekly pay and allowances. See *Native* Articles of War.

ARREST *breaking*—A. B. (rank) of — Regt., placed in arrest, and charged as follows. With having broken his

arrest on the morning, day, afternoon, or night, of — day of ——, 183—. (See *cases,* G. O. C. C. 14th July, 1821; 5th June, and 15th Oct. 1823; 20th June, and 8th July, 1826; 29th Dec., 1828; 31st Dec., 1829; 27th Jan., 1830; 13th Sept., 1831, and 7th Sept. 1836.)

1. Prove that he was placed in arrest.
2. Prove that he broke his arrest.

Sentence. Under articles 22 and 37 Articles of War, "Shall be cashiered." *Honorable Company's service* the same. (Sect. xiv. Art. xxv). *Native* Articles of War the same.

ARSON—Under Section 114 of the Act 9 Geo. 4 c. 74, the charge must contain the words, "*unlawfully and maliciously.*"

A. B. No. — of — Co. — regiment, placed in confinement, and charged as follows.

CHARGE. 1st. For having, between the hours of 7 and 9 o'clock on the night of —— 183—, unlawfully, and maliciously set fire to, and burnt (or part of) the thatched chupper of a shop, the property of ——, situate in the —— Bazar, in the cantonment of —— : OR—"unlawfully and maliciously" set fire to and burnt one of the (or part of the) troop stables of the — Regt., with intent to destroy the said stable, the property of the Honorable Company. (See also, G. O. C. C. 8th Oct. 1827; 27th May, 1828; 15th Oct. 1829; 27th June, 1833; and 18th (K. T. 12th) June, 1835, for *cases.*)

Witnesses. 1. (One may prove the fact) prove the property to have been burnt by the prisoner. (G. O. C. C. 15th Oct. 1829, "by applying some combustible materials, &c.") It is not necessary to charge by what means burnt, but prove how the act was committed.

2. Prove the stable, &c. to be the property of Govt.

Sentence. If found guilty *(felony)* "shall suffer death as a felon" (section 114 of the act): under sections 27 and 29 of the act may transport for life, or term of years. If a *native* soldier, &c., imprisonment, with hard labor on the roads. (See case G. O. C. C. 15th Oct. 1829.)

Attempt to commit, a misdemeanor, and punishable by imprisonment. Consult Regulations of Government for the *Native* troops.

ASSAULTS—with intent to commit robbery, and demands accompanied with means or force. *See* Section 80, 9 Geo. 4 c. 74. Attempts to commit a felony, are misdemeanors, punished by imprisonment.

B.

BLANK RETURNS *signing*—(See G. O. C. C. 28th (K. T. 15th) July, 1836.)

BORROWING MONEY.—(See G. O. C. C. 6th Nov. 1822; (*disobedience of G. O. C. C. 21st Dec.* 1820;) 29th Dec. 1823; 6th Sept. (K. T. 19th Aug.) 1826; 11th July, 8th Sept. and 31st Dec. 1834; 14th March 1835, and 30th Aug. 1836.)

CHARGE. 1st. "With unofficer-like conduct and disobedience of repeated orders issued to the army, in the following instances; viz."

1st Instance. "In having, during the period from the month of —— to the month of —— 183—, at —— and ——, borrowed from ——, pay havildar, — Co. — Regt., or obtained from other persons, through the medium of the said havildar, various sums of money for his, Capt. ——'s private expenses, amounting to Company's rupees —— *(in writing and in figures)*, of which sum Company's rupees —— are still due by Capt. ——."

2nd Instance. "In permitting the said havildar to pay interest upon several of the sums so borrowed, thereby laying himself under further pecuniary obligations to the said havildar."

2nd CHARGE. "With highly improper and unofficer-like conduct, in having quitted India, on furlough to Europe, on the — day of —— 183—, without previously settling his debts to the said havildar, and leaving him responsible for the sums borrowed from other persons on Capt. ——'s account, as stated in the 1st Charge." *(Finding*—acquitted, of 1st count, 1st charge "as the money, though borrowed through the medium of the havildar, left him in no way responsible for the payment of it, and consequently was not in disobedience of G. O. on the subject." Acquitted of the remain-

ing count, and charge. Confirmed, G. O. C. C. 14th March, 1835.)

Witnesses. 1. To prove the different sums of money were borrowed for —— and from whom, *(receipts, &c.)* 2. That they were borrowed for private expenses. 3. That interest was paid for such sums. 4. That such borrowing is in disobedience of G. O., which produce.

Sentence. Discretionary, under article 70, Articles of War. H. C.'s, section xiv. Art. viii., Sect. xxi. Art. ii. If charged and proved to be "Scandalous, infamous conduct, &c." See article 31, and *Honorable Company's,* sections xiv. xxvi. See *Native* Articles of War.

BRIBES—to obtain *promotion*—G. O. C. C. 7th June, 1821. To obtain *leave* of absence—G. O. 26th April, and 14th Oct. 1824. From *prisoners* under his charge—G. O. 15th July, 1824.

BURGLARY *(forcibly breaking into premises).*—G. O. C. C. 15th Jan. and 24th July, 1826. Breaking into a *Canteen*—G. O. 5th June, 1833. Into *shops*—G. O. 26th Oct. 1833, and 3rd June, 1834. Into *Post-office,* and breaking open *treasure* chest—G. O. 26th Jan. 1835. Into a *house,* and stealing money—G. O. 23rd July, 1836. See sections 84, 85, 86 and 87, of 9 Geo. iv. c. 74, and Regns. of Govt. for Natives.

CHARGE. "For having, at Cawnpoor, about 10 o'clock on the night of the 17th May 1836, *feloniously* and *burglariously* broken, and entered the dwelling house of William Moore, and stolen therein Company's rupees one hundred and ninety-nine, (Co.'s Rs. 199), the property of the said William Moore." (G. O. C. C. 23rd July, 1836.)

The Act makes the crime capital if any property to *any* amount be stolen, any one therein being put in *fear ;* or, if the property stolen amount to 50 sicca rupees.

Witnesses. 1. To prove the breaking into. 2. The breaking into may be constructive, as entrance being gained by fraud, or stratagem, or threats with a felonious design (*Starkie,* vol. ii. p. 321). So an entrance being gained even during the *day time,* the subsequent *breaking out* during the *night,* (or while there is no day-light sufficient to discern

the face of man: the light of the moon is immaterial) is a burglarious entry." *Starkie*, vol. ii. p. 319.

3. Prove the house to be the dwelling of the person whose property is robbed. 4. Prove the amount of property and value as charged. If the property be charged to be of the value of 50 Sicca rupees, or thereabouts, though of greater value, proof to such amount makes the crime capital. But if of less value than 50 Rs. be proved, it is not capital, unless some one be put in fear.

SENTENCE. Death if capital; if not deserving of death, may, under sections 27 and 29, be transported for life or term of years; or, under section 87, transportation for life or term of years, or imprisonment for any term not exceeding 4 years.

2nd Count. If it be not a dwelling-house; but a building within the curtilage of a dwelling-house, and occupied therewith, stealing therefrom to any value, or for breaking into a dwelling-house containing a separate court (section 87), and stealing to the value of 50 Rs., may be charged.

C.

CHALLENGE *to fight a duel.*

CHARGE (*case* 1). Capt. C——, charged with unofficer-like conduct, in the following instances; viz.

1st. "In having at ——, addressed an intemperate and offensive note, dated ——, in reply to a note from Capt. T——, of — Regt."

2nd. "In having not officially replied to a public letter addressed by Capt. T. to him, the said Capt. C., dated ——, requesting information on a point of an official nature, but persisting in treating as a *private* quarrel between himself and the said Capt. T., what Capt. T. had informed him, he, Capt. T., had made a matter of *public* discussion, and would consider in no other light."

3rd. "In having, on the 23rd April, 1833, sent a challenge to Capt. T. to fight a duel." (*Acquitted*, G. O. C. C. 1st Oct. 1833.)

PROOF. Letter from Capt. C. to the D. A. G. contained these words—"the taunting, bitter and insulting letter of Capt. T ——, led me naturally to conclude, that his object was personal hostility, and with this idea strongly impressed on my mind, *I demanded from Capt. T. that satisfaction, which his irritating language had goaded me to expect.*" "Here," as observed by the J. A. G. in his remarks, "is a clear *admission* of the challenge."

Case 2. (G. O. C. C. 11th Dec. 1821.) "CHARGE. Lieut. A. G. of the 1st Br. 26th Regt. N. I., ordered into arrest by H. E. the most Noble the Commander-in-chief, for having at Delhi, on the 13th or 14th September last, sent a *written* challenge to fight a duel to Capt. P. P. M. of the same corps."

PROOF. Where a *written* challenge is sent to the officer challenged, or delivered by the second, the proof is easy. In case No. 1, the challenge does not appear to have been expressed in direct terms *to Capt. T——*. If the second of the challenger delivers a *verbal* message, or challenge to the second or friend of the person challenged, the proof must be the evidence of the person to whom delivered, for *third* persons are never present.

SENTENCE. Article 60th, Articles of War, renders the person giving, sending, conveying, or promoting a challenge to fight a duel; upbraiding for refusing a challenge, &c. "*liable*" (under article 69) to be cashiered. In H. C.'s army, section vii. Arts. ii. iii. and v. the penalty is "of *being Cashiered.*" See *Native* Articles of War.

CHARACTER—Case 1. "Conduct unbecoming an officer and a gentleman, in having, on various occasions, but more particularly on the morning of ——, falsely and maliciously fabricated and uttered infamous falsehoods against the character of the — Regt., to which he belongs." (G. O. C. C. 18th Feb. 1826.)

Case 2. 1. Conduct disgraceful and unbecoming the character of an officer and a gentleman in the following instances.

1*st.** "In having maliciously aspersed my character on or about ——, and during my absence from the Regt., by

falsely asserting that I had submitted to an insult from ——, and that he, Lieut. H. could or would prove it."

2nd. "In having, on or about ——, declared to ——, that he, the said Lieut. H., had been induced to decline giving me the satisfaction required by me for the above mentioned aspersion, in consequence of my character and conduct having rendered me unworthy such satisfaction from him; notwithstanding he, Lieut. H., had in writing, under date ——, acknowledged himself to be satisfied with Lieut. C.'s declaration, that the report of my having submitted to an insult from him, was a gross falsehood and calumnious aspersion; such declaration by the said Lieut. H. to —— being a mean and disgraceful subterfuge, and pretext for having avoided that line of conduct towards me, which he had before accused me of deviating from towards Lieut. C., for an alleged insult to me, and for which he had threatened to bring me publicly forward." (G. O. C. C. 13th (K. T. 6th) March, 1826). *See* G. O. C. C. 25th Nov. 1826; 17th and 26th June, 1835.

CHEAT *(Case* 1.*)* "For agreeing to sell a chest to Gunner Charles Cope, of the 1st company, 1st Bn., artillery, for eight (8) rupees; and after having received payment, disposing of the same chest to Bombadier P. Myers, 6th Co. 2nd Bn., artillery; at the same time retaining the money of the said Gunner Charles Cope." *(Appeal)* G. O. C. C. 7th Oct. 1820.

(Case 2.*)* "For having cheated Bombadier Flood of one hundred and eighty rupees, (Rs. 180) by endorsing to him a bill of exchange, knowing that another bill of the same set had already been paid by Mr. Jones, merchant at Cawnpore." (G. O. C. C. 20th Feb. 1836.)

(Case 3.*) Attempt to cheat.* "CHARGE. Private Charles Lawlor, H. M.'s 11th L. D. &c.

1*st.* "That he, the said Private C. L., did, on or about the 12th day of April, 1835, fraudulently (forge), make, or write, or cause to be (forged) made, or written, a note, letter, or writing purporting to be a note or letter from Major K. of — Regt., to the address of —— of ——, and requesting from that person, as a loan, the sum of eight

hundred (800) rupees, or less; the same being done with the intent to defraud the said ———."

2*nd*. "That he, the said Private C. L., did, on or about the 13th day of April, 1835, fraudulently utter and publish the above named note, or letter, purporting to be, &c., by sending, or causing the same to be taken to the said ——, with intent, &c. &c., he, Private C. L., knowing the note, or writing, to (have been forged) "*be written by himself, and not by Major K.*" (The words in *brackets* should have been omitted, and those in *italics* inserted at the conclusion.) "The prisoner's offence (as remarked in the G. O.) is not forgery, nor a cheat, but only an *attempt* to cheat." (G. O. C. C. 23rd (K. T. 15th) June, 1835.)

CHILD *selling—Case* 1.—"Having at —— on — day of ——, unlawfully and without the consent of its mother, the complainant, a native woman, named Soorjee, sold or disposed of a female child (named Soobehgea), under the age of fifteen years, to a prostitute named Jowahir, residing in the bazar of the above place, for the sum of twenty-five rupees, (Rs. 25) or thereabouts, for the purpose of rendering the said child a prostitute, or for some other unlawful purpose." *(See the Regns. of Govt.)* G. O. C. C. 20th April, 1827.)

(Case 2.*)* "With having, on, or about — day of ——, stolen, or aided and abetted in the stealing of Futtoo, a native female child, aged about four (4) years, the daughter of Beemah Kissan, of the village of Peeplea, near the cantonment of Neemuch; and with having subsequently sold the said child for one hundred and two rupees (Rs. 102) to Kyratun, a native woman, residing in the said cantonment." (G. O. C. C. 3rd Jan. 1829.) See G. O. C. C. 8th Sept. 1834, a Native woman tried for stealing—and a man for aiding and abetting and selling, a female child nine years old.

And G. O. C. C. 7th Oct. 1833, importing female children from the Sikh country for sale as *slaves,* and G. O. C. C. 2nd March, 1835, to make *prostitutes.* (See section 69 —— of 9 Geo. 4 c. 74, regarding *European* offenders.)

COIN COUNTERFEITING—Section 73 of 9 Geo. 4 c. 74: (and alter, tender in payment, sell, &c. section 74.)

Farrier D. Foley, 1st troop, 1st. Brigade, H. A. &c.

CHARGES. *1st.* "With having, at —— some time between the 1st day of June and 1st day of October, 1830, falsely and feloniously made, and counterfeited, thirty pieces of false, feigned, and counterfeit money and coin, in the likeness of the good and lawful silver coin, called rupees, usually current, and received as money in payment, in the British territories, in the East Indies, under the Govt. of the E. I. Company."

2nd. "With having, at ——, on the evening of ——, falsely, and deceitfully uttered, tendered, and paid to staff Serj. ——, of the same troop, one piece of false and counterfeited coin, in the likeness, &c.; he, the said Foley, knowing the same to be false and counterfeit." (G. O. C. C. 13th Jan. 1831.)

Proof. 1. "The fact that the money is the king's (or H. E. I. Company's) money, and current within the country, is one of general notoriety, and may be found in evidence of common usage. Where, however, a *new* species of coin has lately been issued with a *new impression,* which is not familiar to the people, it may be desirable to give more precise evidence of the fact."

"Whether there has been a counterfeiting of real coin is for the consideration of the jury; in *law* there should be such a *resemblance* as may in the ordinary course of circulation impose upon the people. It is unnecessary that there should be *any impression* upon the counterfeit coin, if there be evidence to the jury that the counterfeit is of the *likeness* and *similitude* of the *lawful* current coin" *(for the impression of the real coin wears out in time).* "It must appear, however, that the coin was perfected sufficiently for circulation; and therefore, where a *stamp* had been *impressed* upon an *irregular* piece of metal not *rounded* and in an *unfinished* and *incomplete* state for currency, it was held that the offence had not been consummated." *(Starkie,* vol. ii. p. 376.)

2. *Cutting open* the counterfeit coin will detect the fact of its not being the *real* coin. Then the *counterfeit* and the *real* coin can be *compared.*

3. *The prisoner being the counterfeiter.* "It is rarely the case that the counterfeiting can be proved directly, by positive evidence; it is usually made out by circumstantial evidence, such as finding the necessary coining tools in the Deft.'s house, together with some pieces of the counterfeit money in a finished, some in an unfinished state; or, such other circumstances as may fairly warrant the jury in presuming that the Deft. either counterfeited, or caused to be counterfeited, or was present aiding and assisting in counterfeiting, the coin in question. Or if *several* conspire to counterfeit the king's coin, and *one* of them actually do so in pursuance of the conspiracy, it is treason in all, and they may be indicted for counterfeiting the king's coin generally (1 *Hale* 214). Archbald, p. 276. The *uttering* is proved by the persons to whom the coin has been given.

SENTENCE under section 73 of the act —— transportation for life, or term of years. See section 74—uttering, imprisonment for six months.

COMMISSARIAT—Fraudulent accounts, extortion, &c. G. O. C. C. 18th Dec. 1832. Embezzling rum, &c. G. O. C. C. 5th July, 1833.

COMPLAINTS—1. Against the quarter-master of a Regt. (G. O. C. C. 8th April, (K. T. 31st March,) 1835.)

2. Instigating and advising troops to make to a commanding officer. (G. O. C. C. 21st. Dec. 1836.)

CONSPIRACY—to ruin the character of another Native officer. (G. O. C. C. 22nd July, 1822.)

2. By sepoys to petition against their commanding officer. (G. O. C. C. 21st Oct. 1829)

3. Accusing a Native officer of having committed murder. (G. O. C. C. 25th Sept. 1832.)

CONTEMPTS *(of court)*—1. Before a Regtl. court-martial, of a mutinous tendency. (G. O. C. C. 5th Oct. 1824.)

2. Before a *Genl.* court-martial. (G. O. C. C. 7th Oct. 1825.)

3. Before a court of *inquiry*. (G. O. C. C. 5th Dec. 1828.)

4. And striking a sentry in *open court*. (G. O. C. C. 22nd (K. T. 20th) May, 1837.)

COURT OF INQUIRY—1. Falsehood and false accusations before. (G. O. C. C. 24th Jan. 1829; 28th May, 1830; 23rd Aug. 1832.)

2. Drunk before. (G. O. C. C. 25th March, 1831.)

COW—Slaughtered by Moosulmans. (G. O. C. C. 7th Dec. 1820.)

CRUELTY TO NATIVES—(G. O. C. C. 28th Dec. 1816; 9th June, 1821; G. O. G. G. in C. 21st June, 1833.)

CUTTING *off* a portion of a Native woman's tongue. (G. O. C. C. 29th June, 1837.)

D.

DESERTION—*Charge*. 1. "With having deserted from his regiment, stationed at ——— on or about the — day of —— 183—, and not returning until brought back a prisoner, by an escort or guard (seized at —— village, or where he gave himself up)."

2. With having, at or about the time of his desertion, made away with, lost or sold the following articles of Regtl. necessaries (or of clothing, appointments, &c. *specifying them*).

*Witnesses same as in "*Absence without leave*," to which refer.

Sentence. Clauses M. A. 11 and 45, articles 7, 38, 84. *Honorable Company* M. A. sections 7, 10, 11, and section vi. of the Articles of War. And *native* Articles of War. See *Imprisonment and hard labor on the roads*. (G. O. C. C. 22nd and 26th Jan. 1838.)

DISABLING HIMSELF—Charge. "For having, at Muttra, on the 23rd Sept. 1836, wilfully disabled himself for further service, by firing a pistol ball through his left hand." *(G. O. C. C. 5th Jan. 1837.)* See G. O. C. C. 12th July,

1827; 17th July, 1829; 29th Oct. 1830; 5th June, 1832, and 4th July, 1833.

Witnesses. Medical evidence is of consequence in such cases.

SENTENCE. See articles 40 and 50 of the Articles of War. *Imprisonment* the usual punishment. From 3 to 12 months' solitary imprisonment have been awarded (but see restriction as to *solitary* imprisonment, under Chapter 4th). Article 40 directs their being "employed on such duties on military works as may be directed" but not by the court's sentence. Honorable Company's, section xxi. Art. ii.

DISGRACEFUL CONDUCT.

1. Embezzling; or fraudulently misapplying public money.

CHARGE. With *disgraceful conduct,* in having at —— between the — day of —— and the —, embezzled, or fraudulently misapplied the sum of —— *(the amount in writing and figures),* being public money entrusted to him by —— (or belonging to the mess, &c.)

WITNESSES. To prove the embezzlement, &c. by documents and that the money, &c. was public.

SENTENCE. Clauses 7 and 9 of Mutiny Act and articles 18, 72 and 77, Articles of War. *Honorable Company's,* Sect. 42 M. A. and Sect. xi. of Articles of War. See *native* Articles of War.

2. *False or fraudulent accounts or returns.*

CHARGE. "*With disgraceful conduct,* in having on or about the — day of ——, at ——, in his capacity of *(Serjt. Major, Qr. Master Serjt., pay Serjt., Serjt, or Corporal as the case may be)* produced to the pay-master, Adjt., *(or other officer)* certain false or fraudulent accounts or returns, as follows." *(Here specify what accounts, or returns.)*

WITNESSES and *documents* to prove the accounts or returns to be false or fraudulent.

SENTENCE. Clauses 7 and 9 of M. A. and articles 42 and 77 of the Articles of War. In the *Honorable Company's* Army not provided for—see section xxi. Art. ii. of the Articles of War.

3. *Hospital—absenting from without leave or violating the rules of.*

CHARGE. "With *disgraceful conduct*, in having on or about the — day of —— absented himself, without leave, from (the regimental or) the hospital at —— whilst under medical treatment; or having refused to take medicine prescribed for him by the medical officer, &c., or other gross violation of the rules of the hospital, *(as the case may be;)* thereby wilfully producing, or aggravating, disease, or infirmity; or wilfully delaying his cure."

WITNESSES. 1. To prove his being a patient in hospital. 2. Absence without leave (or refusing to take the medicine ordered; or violation of the rules, &c.) 3. The medical officer as to producing, or aggravating, disease—or retardment of his recovery by refusing to take medicine, &c.—the *hospital case book* is evidence as to date of admission into hospital and the nature of the disease, (though not as to its *then state.)*

SENTENCE. 7 and 9 clauses of M. A. and articles 39, 41, 72 and 77 of the Articles of War. In *Honorable Company's Army*, section xxi. Art. ii.

4. *Maiming or mutilating.* CHARGE. "With *disgraceful conduct*, in having at ——, on or about the — day of ——, designedly maimed or mutilated himself, by discharging a loaded musket through his wrist, *(or inflicting a wound with a bayonet, &c.)* with the view of rendering himself unfit for H. M.'s (*or Honorable Company's*) service."

WITNESSES. 1. Prove the fact. 2. As to the *designedly* committing the act; it frequently happens that the soldier has declared he would "soldier no longer, &c." but, the act itself, if not done by *accident*, is sufficient; the object is to release himself from further duty as a soldier *(see article* 40.)

SENTENCE. Clause 7 of the M. A. and articles 40, 72 and 77, of the Articles of War. *Honorable Company's Army*, section xxi. Art. ii. Articles of War.

OR—*Maiming or injuring another soldier.*

CHARGE. "With *disgraceful conduct* in having at ——

on or about the — day of —— concerted with Private —— of — Co. — Regt., and designedly maimed or injured the said Private ——, by discharging a loaded musket through his wrist, (*or inflicted a wound with a bayonet, &c.*) with the view of rendering him unfit for H. M.'s (*or Honorable Company's*) service."

WITNESSES. The *concerting* may be proved by any one who overheard it; or, if not such evidence, by seeing the parties together, or by the fact, and the maimed, &c. party not accusing the other, which he would do, if there had been no *previous concert* between them.

SENTENCE as above.

5. *Malingering.* (See G. O. C. C. 4th November, 1830; 15th May, 1834, and 22nd June, 1835.)

CHARGE. With *disgraceful conduct,* in malingering, and feigning disease at —— between the — day of —— 183–, and the — day of ——, and endeavouring to evade his duties as a soldier by false and unfounded statements to the medical (*and other*) officers of the Regt."

WITNESSES. A soldier will assign various causes at different times, which should be noted at the time, and medical evidence (and sometimes his conduct in a former corps may be) adduced *in evidence.*

SENTENCE. Clause 9 of M. A. and articles 39 and 77, Articles of War. *Honorable Company's Army,* Sect. xxi. Art. ii.

6. *Petty offences of a felonious or fraudulent nature, to the injury of, or with intent to injure, any person, civil or military.*

CHARGE. "With *disgraceful conduct,* in having at —— on or about the — day of —— 183–, fraudulently obtained from ——, the sum of —— (*in writing and figures*), or goods, &c. (*as the case may be*), amounting in value to —— with intent to defraud, &c. ——.

WITNESSES. 1. To prove the money, &c. and amount or value, having been obtained by the prisoner from ——. 2. That it was fraudulently obtained.

SENTENCE. Clauses 7 and 9 of M. A. and articles 49,

72 and 77 of the Articles of War. *Honorable Company's Army*, Sect. xxi. Art. ii. Articles of War.

7. *Purloining or selling Government stores.*

CHARGE. "With *disgraceful conduct*, in having at ——— between the —— and ——, purloined or sold the following stores belonging to the Government *(specifying the different articles)*.

WITNESSES. 1. Prove the purloining (appropriating to his own use) or selling by the evidence of the purchaser, if sold, or, if purloining, the being secreted in, or lodged in some other place than the storeroom. 2. That it is the property of Government.

SENTENCE. Clause 9,*M. A. and 77 Article of War. *Honorable Company's*, Sect. xxi. Art. ii.

8. *Stealing from a comrade, or military officer; or from any military or regimental mess.*

CHARGE. "With *disgraceful conduct*, in having at ——— on or about the — day of —— 183–, stolen from ———, *(specifying articles, and to whom or what mess belonging, &c.)*

WITNESSES. 1. Prove the articles to have been stolen. There is no occasion to see them taken. Being found in his box, or possession, is strong presumptive evidence. 2. Prove to whom they belong.

SENTENCE. Clause 7 of M. A. and Articles 42, 72 and 77, Articles of War. *Honorable Company's*, Sect. xxi. Art. ii.

9. *Tampering with eyes.* CHARGE. "With *disgraceful conduct*, in having between the —— and ——, while a patient in the hospital *(or regimental hospital)* at —— had recourse to means whereby designedly to injure his sight; or having tampered with his eyes; or having caused a partial or total loss of sight by his vice, intemperance, or other misconduct; with the view of rendering himself unfit for H. M.'s (*or Honorable Company's*) service."

WITNESSES. 1. To prove the prisoner is *(or was)* a patient in hospital for the cure of his eyes; that he has not applied the remedy prescribed, but omitted to use it, or using other means, or by vice, drinking, &c. he has retarded the recovery of his sight: *(the hospital case book is evidence of date of*

admission, &c.) 2. The state of his eyes when he was admitted and their present state, and that from his general state of health, except injured by misconduct, &c., a cure would have been effected, or an improvement would have taken place. 3. The object the prisoner has in view will be obvious.

SENTENCE. Clause 7 of M. A. and Articles 39, 41, 72 and 77, Articles of War. Honorable Company's, Sect. xxi. Art. ii.

DRUNKENNESS, HABITUAL. CHARGE. "With having been drunk at —— on or about the ——, this being the *fourth time* within 12 months *(or twice drunk on or for duty, or parade, or on the line of march)*, and thereby constituting an act of habitual drunkenness

OR—"With having been drunk at —— on or about the ——, this being the *second* time of his having been drunk within 6 months, after a conviction of habitual drunkenness, and thereby constituting another act of habitual drunkenness."

N. B. The previous acts of drunkenness may be charged thus:—

Drunk,.......	19th Feb. 1836.	or be proved in evidence, without being charged; but the being charged gives notice to the prisoner.
Do. on duty,..	21st do. do.	
Do. for parade,	1st April, do.	

As to producing *Delirium Tremens,* See G. O. C. C. 3rd Nov. 1836.

WITNESSES. 1. Those on duty, &c. who see him drunk. 2. The defaulter's book for previous cases, &c.

SENTENCE. Clauses 1, 2 and 3 of article 51, and article 77. *Honorable Company's,* Sect. xii. Art. ix. If on duty under arms; otherwise, Sect. xxi. Art. ii.

DRUNK ON DUTY—CHARGE. "With having been drunk on guard at ——— (or on picquet, or other duty) on or about the — day of ——."

WITNESSES. 1. Prove that he was drunk. 2. That he was on duty when drunk.

SENTENCE. Clause 7 of M. A. and Articles of War 21, 53, 72, 77, 79 and 85.

DUEL—See *Challenges.*

E.

EMBEZZLEMENT—(G. O. C. C. 3rd April, 1822; 18th October, 1823; 18th December, 1826; 29th March, and 21st April, 1829; 3rd December, 1831; 5th July, 1833; 27th May, and 10th November, 1834; 25th November, 1835, and 19th (K. T. 8th) August, 1836.)

CHARGE. *(Officer)* "With having at ——— on or about — day of ——, 183–, embezzled, or fraudulently misapplied (or having been concerned in or connived at the embezzlement, or fraudulent misapplication, or damage of) the sum of Company's rupees *(in writing and figures)* or provisions, forage, arms, clothing, ammunition, &c. being the property of H. M. *(or Hon'ble Company or Government)* or —— Regt., &c. entrusted to his charge, &c."

WITNESSES. 1. Prove the money, &c. to be the property of Government, &c. and the exact amount or value. 2. That it has been embezzled by the prisoner or fraudulently misapplied. 3. That it was entrusted to his charge.

N. B. Clause 40, M. A. &c. requires the amount to be ascertained "as a debt to H. M." to be recovered in H. M.'s Court at Westminster, &c. or in the Supreme Courts in India.

SENTENCE. Clause 8 of M. A. and 18th Article of War. *Hon'ble Company's Army,* Sect. xli. M. A. Sect. xi. Articles of War. See *Native* Articles of War.

CHARGE. *(N. C. O.)* "With having at ———, on — day of —— 183–, embezzled, or fraudulently misapplied, the sum of Company's rupees *(in writing and figures)* entrusted to him, being the pay of the men of —— company, &c. or belonging to the mess, &c. (or having unlawfully sold or wilfully suffered to be spoiled —— military stores, &c.)"

WITNESSES—*as above.*

SENTENCE. 18th Article of War. *Honorable Company's Army,* Sect. xlii. M.A. and section xi. Art. v. Articles of War. See *Disgraceful conduct*—see *Native* Articles of War.

ENEMY, *Desertion to*—CHARGE. "With desertion to the enemy in the month of December, 1825, or of January, 1826,

at Bhurtpoor, in which fortress or town he was taken prisoner by the British troops on the assault on the 18th Jan. 1826."

2. "With having aided and abetted the enemy against the British arms." (*G. O. C. C. 28th Jan.* 1826.)

WITNESSES. 1. In this case it appeared that "sufficient evidence was produced to prove that *Bombr. Herbert,* did *voluntarily* desert to the enemy, as it is clearly in evidence, that having broken his arrest he went close under the walls of the fort,—there being no cause for presuming that he was ignorant of his road—in company with two men with whom he appeared to have been in communication, and on being seized" (*by the enemy*) "surrendered himself without resistance."

2. Most clearly if a man leaves his arrest, and goes towards an enemy's fort with two men belonging to such enemy, there can be no doubt of his intention He would never have gone towards the fort in such an *open* manner had he no design.—In this case it was proved that he assisted to fire the enemy's guns.

SENTENCE. In this case was to be "*hanged.*" Clauses 1, 11, and 7th, Article of War. *Honorable Company's Army,* sections 1, 7—and section vi. Articles of War. See *Native* Articles of War. See G. O. C. C. 27th, 28th January, and 1st February, 1826.

ESCAPE OF PRISONER—CHARGE. "With neglect of duty, when on sentry at the Regimental guard-room door, at ———, on or about the — day of —— 183–, between the hours of —— and ——, in having permitted one of the prisoners *(insert name)* to quit the guard-room, and effect his escape from confinement; such conduct being subversive of military discipline, and in breach of the Articles of War."

WITNESSES. 1. Prove the prisoner was put on sentry at —— hour, and standing sentry when the prisoner escaped.

2. Prove that the escaped prisoner was then in confinement. (It is usual to count the prisoners, or the sentry to be satisfied as to the number.)

SENTENCE. 70 and 79 Articles of War—*vide* Restriction

as to *solitary* imprisonment under chapter 4th G. O. C. C. 1st and 6th November, 1822; 16th June, 25th August, and 16th Nov. 1824; 22nd September, 1825; 20th February, and 9th September, 1837.

F.

FALSE PRETENCES, *Obtaining money, &c. under*—Section 106, of the 9 Geo. 4, c. 74, declares, "that if any person shall by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, &c. shall be liable to be transported for any term not exceeding 7 years, or to suffer (fine or) imprisonment, or both." (No *fine* in military courts.)

Case 1. CHARGES. (10th (K. T. 6th) June, 1834.)

1. "With having, on or about ———, obtained, under a false name and address, a silver watch, with chain, seals and key; a penknife, and an umbrella, the property of Mr. G. A., a merchant, residing in or near the military cantonment of Agra, and not having since paid for, or returned the same."

2. "With having, on or about the time stated in the 1st charge, obtained, on a false pretence, a horse from Mr. G., an Armenian, residing in Agra, and having sold the said horse, the property of the aforesaid Mr. G., at Ferozabad, to one Surfrask, a native."

WITNESSES. 1. Prove the obtaining under a false name and address, or pretence, as assuming a different name and address from the real name and address,—(that is, instead of Private ——, &c. assuming the name of Mr. ———.) 2. That the property belongs to Mr. G. A., &c. residing, &c. 3. Prove that the property has not been paid for, or returned. 4. Prove that the other property so obtained was sold to —— (these persons are witnesses of course).

SENTENCE as above. See also G. O. C. C. 18th (K. T. 12th) January, 1836.

Case 2. CHARGE. 1. "Corporal Timothy Fahey, of Captain B.'s Company, H. M.'s 44th Regt., charged with having at Cawnpoor, on or about the 1st of January, 1833, feloniously made or framed a promissory note for five hun-

dred and fifty rupees (550) in the name of Gunnace, a native inhabitant of Cawnpoor, and payable to him, the said Corporal Fahey, as follows :

"I promise to pay to Corporal Fahey, of Capt. R. Smith's Company, of H. M.'s 44th Regt., the sum of (550) five hundred and fifty sonat" (now *Company's*) "rupees, being the amount in full of cash received from him, the said Corporal Fahey, on the 17th of September, which I promise to deliver to the said Timothy Fahey, 44th foot or order, (7) seven days after sight, at the rate of nine rupees per cent. per annum. Given under my hand, this 17th day of September, 1832, at Cawnpoor."

"(Signed) G. GILROY, Private.
J. KINGSLEY, Color and Pay Sergt."

"He, the said Timothy Fahey, having obtained the signature of the said Gunnace under a false pretence, and having obtained also under a false pretence Private George Gilroy to write the words above the said signature, and obtained, also under a false pretence, the attestation of serjeant (now private) James Kingsley, as a witness to the note, with intention to defraud the said Gunnace."

2. "With having, at Cawnpoor, on or about the 4th January, 1833, feloniously offered or uttered, as true, the above paper, or promissory note, knowing the same to be false, with intention to defraud the said Gunnace."

WITNESSES. 1. The proof that *Gunnace* was induced to sign the note under a false pretence, and his handwriting. 2. Of the handwriting of *Gilroy* of the words above Gunnace's signature, and of such writing under a false pretence. 3. Of *Kingsley's* attestation to the note, under a false pretence. 4. Of the offering or uttering of the note, as true. If made under a false pretence, the intention to defraud results as a consequence of the former proofs.

SENTENCE. "Transportation for a period of seven (7) years."

See G. O. C. C. 4th March, (K. T. 1st Feb.) 1834; making a "*false paper*" (signing the name of the Captain of the troop) by means of which to obtain beer from a merchant.

FORGERY—The 72nd section, 9 Geo. 4, c. 74. declares that "if any person shall falsely make, forge, counterfeit, or alter, or shall utter, or publish as true, or sell, offer to dispose of, or put away, knowing the same to be false, forged, counterfeited or altered, any deed, or any written instrument for the conveyance or transfer of any property, &c. Will, Testament, Bond, Writing, Bill of Exchange, Promissory Note, &c. shall be guilty of felony, &c. liable to transportation for life or any term of years, or imprisonment for any term not exceeding 4 years."

CHARGE. 1. "With having at ——— on — day of ——— feloniously and falsely made, forged and counterfeited, a certain promissory note ——— bearing the signature of A. as follows, *(insert the same)* with intent to defraud A."

2. "With having at the same time and place *(or some other)* feloniously uttered and published as true, *(or sold, &c.)* the said promissory note, knowing the same to be falsely made, forged and counterfeited by offering the same to B. with intent to defraud the said A."

WITNESSES. 1. A. (under section 32, though an interested party may be a witness) proves that the writing of the promissory note and signature are not in his handwriting.

2. B. proves that it was offered to him, by the prisoner.

SENTENCE, as above.

FRAUD AND EXTORTION—G. O. C. C. 18th Dec. 1832, pages 401 and 403.

G.

GUARD LEAVING, &c.—See *Post.*

H.

HIGHWAY ROBBERY—The 80th section, of the 9 Geo. 4, c. 74, enacts, "that if any person shall rob any other person of any chattel, money or valuable security, every such offender being convicted thereof shall suffer death as a felon; and if any person shall steal any such property from the person of another, or shall assault any other person with intent to rob him, or shall with menaces or by force demand

any such property of any other person with intent to steal the same, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, &c. to be transported for life or for any term of years, or to be imprisoned for any term not exceeding 4 years."

CHARGE. (*Thomas Rigby, Gunner, 2nd. Co. 5th Bn. Arty.*) "With feloniously assaulting Ramnath, a post-office runner, on the highway near Agra, on the 11th Sept. 1835, and from the person, and against the will of the said Ramnath, feloniously taking, stealing, and carrying away a cloth, the property of the said Ramnath, a small box, the property of Capt. Philip Cortlandt Anderson, of the 64th Regt. Native Infantry, and a parcel, the property of persons unknown."

WITNESSES. 1. The evidence of *Ramnath* alone would be sufficient, for though not stated if the act was committed in the *night* or by day; still it is seldom that such acts are committed when others are present; and most likely the prisoner concealed himself on the road for the purpose.

2. Capt. A——, or some other person to prove the property to be his. The stealing of property of persons unknown is equally a felony. (*Russell on Crimes*, vol. ii., p. 162.)

3. The committing the act by force, or against the will of *Ramnath* proved the "*felonious* and *violently* taking."

4. The act declares the robbing of *any chattel*, so that the value is immaterial: and now, by section 77, of the Act the distinction between *grand* and *petty* larceny is abolished.

SENTENCE. "Transportation for fourteen (14) years," (*G. O. C. C.* 11*th Jan.* 1836,)—under sections 27 and 29, of the Act, the court may, instead of a sentence of *death*, transport for life, or for a term of years.

I.

INSUBORDINATE AND OUTRAGEOUS CONDUCT TOWARDS A SUPERIOR.

CHARGE. "With having at ——— on or about the ——— day of ——, used abusive and threatening language to *(or towards)* ——— his superior officer, and declaring, if ever he had an opportunity that 'he would take away his life,'

or words to that effect. Such conduct being insubordinate and outrageous, and subversive of good order and military discipline."

Or—"With having at ———, on or about ———, threatened (or avowed an intention) to shoot ——— his superior officer; he, the prisoner, having his musket loaded with powder and ball *(or shot)* at the time; such conduct being insubordinate and outrageous, and subversive, &c."

Witnesses. 1. The evidence of the superior officer, or the threat may have been made use of in the presence of others who should then be examined. 2. In the *second* case prove that the prisoner's musket was so loaded. The avowal of the intention may have been made to the superior officer; or to others.

Sentence. Clause 7 of M. A. and articles 70, 72, 77, 79 and 80, *Honorable Company's*, section xxi. Art. ii. See *Native* Articles of War.

INSULT TO HINDOOS BY MOOSULMANS—*(Regarding the killing of a cow.)* G. O. C. C. 7th Dec. 1820.

M.

MALINGERER—See *Disgraceful conduct.*

MANSLAUGHTER—Section 56, of 9 Geo. 4, c. 74, declares, that "where any person, being *feloniously* stricken, poisoned, or otherwise hurt, at any place whatsoever, either upon the land or at sea, within the limits of the charter, &c. shall die of such stroke, poisoning or hurt, in places *without* those limits, or being feloniously stricken, &c., at any place whatever, either upon land or at sea, shall die, &c. of such stroke, &c., at any place *within* the limits aforesaid, every offence committed in respect of any such case, whether the same shall amount to *murder* or *manslaughter,* or of being accessary *before* or *after* the fact to murder or manslaughter, may be tried, &c."

Charge. (*Gunner Nicholas Carrolan, &c.*) "With manslaughter, in having at Secrole, (*Benares,*) *feloniously* and *wilfully* killed Gunner Miles Neille, of the same Company, by throwing him down with force upon the ground, and fall-

ing upon him, on the 12th February, 1838, by which his bladder was ruptured: whereof the said Neille died on the 16th February, 1838."

WITNESSES. 1. As *Neille* was killed in consequence of a fall he received while fighting with *Carrolan,* the bystanders who saw the fight, and those who heard the challenges to fight were the witnesses. 2. Medical evidence to the cause of the death: see evidence *Murder.*

SENTENCE. Imprisonment one (1) Calendar month. (*G. O. C. C. 20th March,* 1838.) See *precedents* under *Manslaughter* regarding this case.

Under section 57 of the Act the sentence may be transportation for life (as in the case of *Gunner Mulcahy* tried for *murder ;* 8 out of 15 found him guilty of murder—an aggravated case. G. O. C. C. 23rd August, 1833,)—" or term of years not less than 7 years, or imprisonment not exceeding 4 years or to pay a *fine.*" (No *fine* in military courts.)

N. B. For cases by *shooting,* G. O. C. C. 15th May, 1828 and 10th Jan. 1838. By *kicking,* 24th May, 1828. By *striking and beating,* 2nd and 15th June, and 29th August, 1829; 29th Oct. 1830; 16th March, 1833; 16th May, 1834; 25th March, 1836; 6th Oct. 1837. By *fighting,* 26th Aug. 1837; and 20th March, 1838.

MESS, *Misconduct at*—G. O. C. C. 16th April, and 17th July, 1830; 7th Feb. 1835; 27th (K. T. 23rd) Jan. 1836—improperly certifying being kept up, 30th April, 1836.

MURDER—1. "Is the killing any person, &c. with malice prepense or forethought, either express or implied by law. *Express* malice is, when one person kills another with a sedate deliberate mind and formed design: such formed design being evidenced by *external* circumstances, discovering the *inward* intention; as lying inwait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. (*Russell on Crimes,* vol. i. p. 421.) And malice is *implied* by law from any deliberate cruel act committed by one person against another, however sudden: thus when a man kills another suddenly without any, or without a considerable provocation, the law implies malice.

So if a man wilfully poisons another; in such a deliberate act, the law presumes malice, though no particular enmity can be proved. And it should be observed as a general rule, that all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears from circumstances of alleviation, excuse, or justification." (*Ibid.* p. 422.)

2. "Where the defence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose was effected. And the provocation will be no answer to proof of *express* malice. But where *fresh* provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the *antecedent* malice; for if there be an *old* quarrel between A. and B., and they are reconciled again, and then, upon a *new* and sudden falling out, A. kills B. this is *not* murder. It is not to be presumed that the parties fought upon the *old* grudge, unless it appear from the whole circumstances of the fact: but if upon the circumstances it should appear that the reconciliation was but pretended or counterfeit, and that the hurt was done upon the score of the *old* malice, then such killing will be murder."

3. "Where knowledge of some fact is necessary to make a killing murder, those of a party who *have* the knowledge will be guilty of murder, and those who have it *not* of manslaughter only. If A. assault B. of malice, and they fight, and A.'s *servant* come in aid of his master and B. be killed, A. is guilty of murder; but the *servant* if he knew *not* of A.'s malice, is guilty of manslaughter only." (*Ibid.* p. 423.)

"It is agreed that no person shall be adjudged by any act whatever to kill another, who does not die thereof *within a year and a day* after the stroke received, or cause of death administered; in the computation of which the whole day upon which the hurt was done is to be reckoned the first." (*Ibid.* p. 428).

4. "It has been ruled, that if a man give another a stroke not in itself so mortal but that with good care he might be cured, yet if the party die of *this* wound, within the year and a day, it is murder, or other species of homicide, as the case may be: though if the wound or hurt be not mortal, and it shall be made clearly and certainly to appear that the death of the party was caused by ill applications by himself or those about him, &c. and not by the wound, it seems that this is *no* species of homicide. But when a wound not in itself mortal, for want of proper application, or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the *immediate* cause of the death of the party wounded, the party by whom the wound is given is guilty of murder, or manslaughter, according to the circumstances." *(Ibid.)*

5. "If a man be sick of some disease, which by the cause of nature, might possibly end his life in half a year, and another gives him a wound or hurt which hastens his death, by irritating and provoking the disease to operate more violently or speedily, this is murder or other homicide, according to the circumstances, in the party by whom such wound or hurt was given. For the person wounded does not die simply *ex visitatione Dei*, but his death is hastened by the hurt which he received; and it shall not be permitted to the offender to apportion his own wrong." (*Ibid.* p. 429.)

6. "In order to make an abettor to a murder or manslaughter principal in the felony, he must be *present* aiding and abetting the fact committed. The *presence*, however, need not always be an actual standing by within *sight* or *hearing* of the fact; for there may be a constructive presence, as when *one* commits a murder and another keeps *watch* or guard at some convenient distance. But a person may be present; and, if not aiding and abetting, be neither principal nor accessary: as, if A. happen to be present at a murder and take no part in it, nor endeavour to prevent it, or to apprehend the murderer; this strange behaviour, though highly criminal, will not of itself render him either principal or accessary." (*Ibid.* p. 431.)

Charge. (*Serjt. Bryan Smith, Artillery.*) "With having, in the Artillery camp, in the cantonment at Kurnal, on the night of the 23rd, or morning of the 24th December, 1829, feloniously, wilfully, and of his malice aforethought, murdered, or having aided, assisted, or been concerned in the murder of staff Serjt. Peter Malcolm, of the same company and battalion, by beating and strangling him; also by fracturing his skull with some instrument, weapon or implement; also by inflicting several wounds on his head with some pointed instrument or weapon, and thereby inflicting a mortal wound or wounds, of which he (staff Serjt. Peter Malcolm) died on the night or morning aforesaid."

Witnesses. The positive evidence of this case as to the act of striking was by *one* witness. But, there were various circumstantial proofs in the case—such as blood being found on the prisoner's clothes (concealed under his bed) the next morning, the clothes *wet* and the *blood* partly washed out; his turning pale when accused; the Hooqu bottom with which he did the deed being his own and bloody; and it having been seen in the tent of Malcolm the evening before and found there next morning (*bloody*), there having been a previous misunderstanding between them. The prisoner making his comrades in his tent drink to prevent their noticing what he did—going out of the tent several times during the night—the groans of the deceased being heard by another man in the prisoner's tent which was close to that of the deceased—the deceased being left at night by several serjeants, &c. in a drunken state, and though a more powerful man when *sober*, than the prisoner, known to be helpless when *drunk*—and though the night was dark a charcoal light in Malcolm's tent enabled the *single* witness, by looking into the tent, to see the blow or blows—his not going near the tent of the deceased next morning, as was natural for him to have done had he been innocent, and as all the other N. C. O. did!

Sentence. To be hanged, (*G. O. C. C.* 21*st April*, 1830.) See sections 54, 55 and 56; also 27 of 9 Geo. 4, c. 74. See Cases. Killing with a *sword*, G. O. C. C. 18th Aug. 1827;

10th Jan. and 14th March, 1829; 3rd Nov. 1830; 19th Dec. 1832. By *strangling*, 8th Jan. 1835. By *kicking* and *beating*, 24th May, 1828; 31st Dec. 1829. By *stabbing*, 1st Feb. 1831—with a *bayonet*, 17th April, 1828; 22nd June, 1829—with a *knife*, 14th March, 1829; 23rd Feb. 1832; 18th April, 1833. By *shooting*, 15th May, 1828; 23rd April, 1831; 13th Nov. 1832; 14th May, 1836. By *cutting* and *maiming*, 14th Feb. 1832. *After fact*, 30th March, 1832; 19th July and 6th and 8th Nov. 1834.

MUTILATING—See *Disgraceful conduct*.

MUTINY—(See distinction between *Mutiny*, and *Mutinous* conduct, under *Precedents*, and *Index*.)

CHARGE. Case 1. (*Private Robert Messinbird*, H. C. European Regt.) "With mutiny, in having at Dinapoor, between the hours of eleven (11) in the forenoon and one (1) in the afternoon, on the 30th day of March, 1834, when on duty at the regimental barrack guard, feloniously, wilfully, and *maliciously*, (not unlawfully) stabbed, with intent to murder, and dangerously wounded, with a bayonet, Serjeant James Hilton, of the H. C.'s European Regt., his superior officer, and in charge of the guard to which he (Private Robert Messinbird) belonged."

WITNESSES. The remarks by the Comr. of the Forces explain this case.

1. "The only conjectural inducement for the selection of the serjeant is, that the rank and occupation of his intended victim would enhance and establish the crime as violence against his superior and immediate Comg. officer."

2. "The belief that depravity so hardened could not exist, might thus throw a shadow of rationality on the prisoner's assertion, that the stab was accidental, were not the evidence so positive, so circumstantial, and so unquestioned, as to render irresistible the conviction, that the conduct of the prisoner was cool, meditated, and murderous."

3. "His entrance from the verandah, where his own cot was situated, into the guard room, where the serjeant was *asleep*, and remaining there a few seconds; his *second* entrance and looking around, and then retiring to his cot;

his *third* entrance, *silently* walking up and taking down the bayonet from the rack on the wall, and, on being remonstrated with, for disturbing accoutrements not his own, declaring that he sought his own property; his *instantaneous* crossing to the other side of the room to the cot of the *sleeping* serjeant; the forcible plunge of the bayonet with *both hands;* his *attitude* immediately after the stab; the absence of any exclamation of *sorrow* or *surprise,* his perfect *silence* throughout the act, and on his seizure; all repel the belief of accident, and demand the execution of the fatal sentence."

SENTENCE. "To be hanged." (*G. O. C. C. 21st June,* 1834.)

Case 2. (*Private Gretton,* 31*st Foot.*) CHARGE. "Highly mutinous conduct at —— on —— day, &c. in repeatedly striking Corporal Joseph Bradley, of the same company, when in the execution of his duty, and using to the said corporal highly mutinous and threatening language, declaring, that he would 'then have taken his life, had not assistance come to him, (the corporal) and that he would take his life if ever he (the prisoner) got out of the guard house;' or words to that effect. Threatening also to take the life of Private Patrick Fitzsimmons, of the same company, who was one of the fatigue party, sent with the corporal to seize and confine him (the prisoner)."

SENTENCE. Fourteen years' transportation as a felon. (G. O. C. C. 24th (K. T. 2nd) Feb. 1834.)

REMARK. In the case of Private Martin Birmingham, 41st Foot, tried on two charges for *mutiny.* 1st. For having, at Moulmein, on the —— after the company had been inspected on its private parade, and before it was marched to the general parade of the Regt., for the purpose of practising with *blank* cartridge, loaded his firelock with two rounds of blank cartridges and a *musket ball.*"

2nd. "For *mutiny,* in having avowed when going to the Regimental guard room, on the aforesaid afternoon, that he had loaded his firelock for the purpose of shooting either Lieut. Col. C. Purdon, or Lieut. R. Harnett, of the same regiment."

SENTENCE. "Transportation, as a felon, for seven (7) years."

REMARKS by *Lord Hill,* Genl. Comr.-in-Chief. "I have to acquaint your Lordship, that the court have, in this case, awarded a sentence which could not *legally* be enforced, inasmuch as neither the charges, nor the particular facts as adduced in evidence in support of them, constitute an offence within the true intent and meaning of the first clause of the mutiny act, so as to authorize it to award such a sentence. Under these circumstances, H. M. was pleased to extend his most gracious mercy to the prisoner, Private M. B. &c. and to command, that he be allowed to return to his duty, being admonished to be careful how he again incurs H. M.'s displeasure."

(Signed) HILL, &c.

Genl. Rt. Hon'ble Lord W. Bentinck, G. C. B.

(G. O. H. G. 15th June, 1833.) G. O. C. C. 15th (K. T. 1st) Feb. 1834.

And (*G. O. C. C.* 19*th June,* 1833), Private Callaghan, H. C.'s European Regt.—"*Mutiny*" whilst the Adjt. (in execution of his duty) was visiting the cells, in which the prisoner was undergoing dry room punishment, having told me "*that he would shoot me when he got out, and that he would have done so before, had he not been confined to the log*" or words to that effect.

SENTENCE. "Solitary imprisonment 18 months." *Not confirmed.* "The Commander-in-Chief concurs in opinion with the J. A. G., that the fact charged in the crime, and proved in evidence, does not amount to the capital offence of '*mutiny,*' and ought to have been designated as *mutinous conduct* only."

CASES. *Firing* at an *officer* at parade, G. O. C. C. 25th Jan. 1830. At a *Serjt. major,* 12th Nov. 1830. *Cutting* at with a *sword,* 12th July, 1827. *Striking* his *superior officer,* 4th Feb., 17th April, 3rd May, 1830—his *Comg. officer,* 4th Nov. 1830. At *Church parade,* 22nd May, 1832. *Killing* the *Adjutant* on *parade,* 15th Dec. 1828. *Threatening* officer, 21st Nov. 1829; 16th April, 1830. *Lying* in *wait* and *knock-*

ing down, 30th Oct. 1830—with *concealed arms* about him, 9th Sept. 1828, 4th May, 1830. *Mutinous* while being flogged, 19th June, 1829.'

N.

NATIVE OFFICERS—Accusing an European officer. (G. O. C. C. 4th Sept. 1835.)

Abusing sepoys, and improper conduct. (G. O. C. C. 7th Feb. 1837.)

NEWSPAPERS—Writing complaints and grievances in. (G. O. C. C. 29th Nov. 1828; 23rd Oct. 1835; 6th Jan. and 13th Oct. 1836.)

O.

OATH—Administering in the case of a mutiny, to prevent disclosure of the state of the Regt. (G. O. C. C. 13th May, 1816.) See, also, 9th Sept. 1825.

OFFICER—Drunk and exposing himself in Calcutta. (G. O. C. C. 6th Feb. 1835.)—Drunk, and entering the mess-tent of another Regt. (1st Aug. 1835.)—Drinking with N. C. O. and men. (31st (K. T. 29th) Dec. 1835.)

OPPRESSION AND ABUSE OF AUTHORITY—(G. O. C. C. 26th Aug. 1833.)

ORDERS, DISOBEDIENCE OF—CHARGE. "With having at —— on or about the —— disobeyed the orders of —— his superior officer, in having refused to fall into the ranks, *(or as the case may be,)* although repeatedly ordered so to do." N. B. The words "in the execution of his duty," after "superior officer," are usually inserted; but he *must* be while giving any order*.

WITNESSES. 1. The superior officer must at times, be the only person to prove the fact. It is usual to examine one or more others, if they heard the order given, and any reply made by the prisoner, which reply proves that he *heard* the order. 2. The only doubt would be if there was any

* The words of article 12 are—"Who shall disobey the lawful command of his superior officer." The same in the Honorable Company's article.

great noise at the time; or that the prisoner may be somewhat deaf.

SENTENCE. Clause 7 of M. A. and articles 12, 72, 77, 79, 80 and 85 of the Articles of War. *Honorable Company's*, M. A. section i. and section ii. article v. of the Articles of War. See *Native* Articles of War.

P.

PARTY—Misbehaviour at. (G. O. C. C. 4th Jan. and 9th July, 1828.)

PAY—Making unauthorized deductions from, (G. O. C. C. 26th April, 1824.) Sepoys refusing to receive their balances, (G. O. C. C. 9th Aug. 1811). See *Embezzlement.*

PENSION—Instigating and assisting men fraudulently to obtain a pension from Government by falsely representing himself to be the father of a deceased sepoy. (G. O. C. C. 25th May, 1835.)

PERJURY AND SUBORNATION OF PERJURY—

1. "Perjury, by the common law, appears to be a wilful false oath by one who, being lawfully required to depose the truth in a proceeding in a Court of Justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not."

2. "*Subornation of Perjury* by the common law is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath. But it seems clear that if the person incited to take such an oath, do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment."

3. "Inciting a witness to give a *particular* evidence, where the inciter does not know whether it is true or false, is a high misdemeanor." (*Russell on Crimes,* vol. ii. p. 517.) "The false oath must be wilful, and taken with some degree of deliberation; for if upon the whole circumstances of the case it shall appear probable, that it was owing rather to the weakness than perverseness of the party, as where it was oc-

casioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable."

4. "A man may be indicted for perjury, in swearing that he *believes* a fact to be true which he must know to be false. The important requisites in a case of perjury appear to be these; *the false oath must be taken in a judicial proceeding, before a competent jurisdiction, and it must be material to the question depending.*" (*Ibid.* p. 518.)

5. By section 35 of 9 Geo. 4, c. 74, it is declared that, if, "any offender hath been or shall be convicted of any misdemeanor which renders the parties convicted thereof incompetent witnesses *(except perjury or subornation of perjury)*, and hath endured the punishment, &c. such offender shall not be deemed to be an incompetent witness in any court or proceeding, civil or criminal." By section 36, where an *affirmation* or *declaration* is made, the swearing falsely and corruptly renders the witness liable to the same punishment as if an *oath* had been taken.

6. By Clause 78 of the Annual Mutiny Act (1837), the crime is "liable to such pains and penalties as by any laws now in force any persons convicted of wilful and corrupt perjury are subject and liable to." So that a king's officer or soldier would be tried in *India* under the 9 Geo. 4, c. 74, by general court-martial, (under Article of War 102,) if the troops are stationed at places *upwards* of 120 miles from Calcutta, &c. "but not if *within* 120 miles, &c. In the *Honorable Company's* army, officers and soldiers are (under section 64 of 4, Geo. 4 c. 81), triable and punishable by a general court-martial at *all* places wheresoever committed. (See *Native* Articles of War.)

Charge. A. charged as follows:—"With wilful and corrupt perjury in the following instance or instances.—1*st Instance*—That at a —— court-martial held at —— on— day of —— of which —— was president, for the trial of P., the said A. having been duly sworn (or made a solemn affirmation or declaration) as a witness for the prosecution *(or*

defence), did falsely, knowingly, wilfully and corruptly give evidence before the said court touching the said trial, as follows, (*insert some material part or parts of his evidence*) which said evidence is false and untrue, was material evidence on the said trial, such giving of false and untrue evidence, operating to the perversion of truth and the due administration of justice."

Or—For "*subornation of perjury*"—After the words "trial of P. the said C. did wilfully and corruptly instigate and persuade (or solicit and procure) B. a witness at the trial of the said P. for the prosecution *(or defence)*, the said B. being duly sworn, &c. to give false and untrue evidence, and the said B., so instigated, &c. did knowingly give evidence as follows *(insert, &c.)* which said evidence is false and untrue; the said C. having instigated and induced the said B., to give such false and untrue evidence, with the intention to prevent the truth and to impede the due administration of justice."

Witnesses. 1. *Two are necessary.* "The evidence of *one* witness is not sufficient to convict the defendant on an indictment for perjury, as in such case there would be only *one* oath against *another.*" *(Russell,* vol. ii. p. 544.) "But this rule must not be understood as establishing that two *witnesses* are necessary to disprove the fact sworn to by the *Deft.*, for if any material circumstance be proved by other witnesses, in confirmation of *the* witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction." (*Ibid,* p. 545.)

2. This is exemplified in this way—A. is the perjured witness—D. and F. contradict him, at the trial, in some *material* evidence. The evidence of D. and F., examined as witnesses at the trial, can prove the evidence of A. to be false. But it may so happen that there shall be only D. to contradict A.; still, if F. an unexamined witness can contradict A., he, joined with D., will convict A.; or, it may be neither D. or E. were examined, and it subsequently appears that G. H. never examined at the trial can contradict A. now, these two witnesses will convict A.—And at a trial where a gentle-

man was in court, who had heard the *same* witness depose differently at a former trial for the same crime where other prisoners had been tried, he immediately addressed the judge, and stated the fact.

3. The evidence given by A. is sworn to by any members of the court, or other persons present during the trial. Those witnesses who gave their evidence at the trial are examined; or others who know the facts to be false, though not before examined.

4. Prove that the trial of P. took place.

5. Prove that A. was duly sworn *(or affirmation, &c.)* and produce the record of the trial in which the perjury is assigned.

6. Compare the evidence given at the trial of P. with the evidences of D. E., D. F. or G. H., as the case may be.

OR—*Subornation of perjury.* 1. Prove, that B. was sworn and gave evidence on the trial of P. 2. That C. solicited and procured B., to give false evidence. 3. That B. gave false evidence, as above.

SENTENCE. Imprisonment, Section 64 of 4 Geo. 4, c. 81. (Honorable Company's Army) and *Native* Articles of War.

PETITION—Against *Commanding Officers,* (G. O. C. C. 17th Sept. and 21st Oct. 1829. Regarding *promotion,* 4th Sept. 1835. Against *Pay Havildars* of troops, 27th Sept. 1836.

POISON—*Attempt to murder by poison.* Section 59 of 9 Geo. 4, c. 74. "With having at ——— on ——— day of ——— *unlawfully* and *maliciously* administered, or attempted to administer to A., or having caused to be administered by B., poison or other destructive, noxious or deadly substance or ingredient or drug *(name the article; and say or other destructive, &c.),* with intent to murder the said ———."

WITNESSES. 1. Prove that the attempt to administer poison, &c. to A., or if by B., that ——— caused B. to administer.

2. It is often advisable to ascertain from what shop, &c. the prisoner purchased the poison, and the reason he gave for buying such a quantity (as druggists are cautioned against the sale of poison to unknown persons.)

3. If bought about the time it was administered.

4. Search should be made to see if A., or B., have any poison, &c. in their possession concealed.

5. It does not seem necessary to prove the exact quantity of poison administered—for a certain quantity will affect different persons, in various ways according to constitution, or state of health—it is the *animus*—the maliciously administering the drug. The prisoner may be ignorant of the precise chemical effect produced on the stomach by the presence of 5 grains, though it may require 10 to kill—or 10 may have been put into gruel, or food and only 5 grains may be found—or the presence of poison may appear—the quantity unknown—the rule of law is, that—"no one shall take advantage of his own wrong."

SENTENCE. Under section 59 of the Act, *death*—but under sections 27 and 29—transportation for life, or term of years may be awarded—for section 27 only bars a less sentence in the case of *murder*. (*See G. O. C. C. 15th October*, 1829.)

POST, *Sleeping on*— "With having been found sleeping on his post, when sentry over ——— at ——, between the hours of —— and —— on or about the night (*day or morning, &c.*) of ——."

WITNESSES. 1. Prove that the prisoner was put on duty as sentry at the place on the day and at the hour. 2. At what hour found asleep. 3. The Serjt. or corporal going his rounds would prove that he was not challenged—or that he found the prisoner asleep, having heard so from others and going to the spot. 4. The musket or arms, of the sentry may have been taken away from him which is strong proof. 5. The defence usually made is that the prisoner was taken ill and fell down, and was overcome by the heat, &c. I have known the case of a prisoner declaring he was attacked by cholera. He was taken to hospital—it was from the effects of hard-drinking. In these cases ask, "was the prisoner drunk?"

SENTENCE. Clauses 1 and 7 of M. A. and articles 17, 72, 77 and 85 of the Articles of War. *Honorable Company's*

section 1, of M. A. and section xii. Art. x. Articles of War. See *Native* Articles of War.

2. *Leaving post before regularly relieved.* "With having, without being regularly relieved, left his post, when sentry over —— at —— between the hours of —— and —— on or about the night *(day, morning, &c.)* of ——."

WITNESSES. 1. As above. 2. Prove that he was not *regularly* relieved. It is a crime if, before his tour of duty be out, he allows another sentry to relieve him. 3. If sick, sentries are desired to pass the word to the guard for relief. Nothing but sudden illness, or call of nature, can be an excuse.

SENTENCE. As above.

3. *Leaving a Guard or Picquet.* "With having on or about the —— between the hours of —— and —— left his guard (or picquet) at —— without having obtained leave from the officer, or N. C. O., in command of the said guard, &c.—and not returning until between the hours of —— and —— (or until seized and brought back (and then drunk, &c.) or if he did not return leave out, 'and not returning, &c.')"

WITNESSES. 1. That he belonged to the guard, &c. 2. That he obtained no leave. 3. That he was seized. 4. That he was drunk, &c.

SENTENCE. Clause 7 of the M. A. and articles 29, 72, 77, 79 and 85 of the Articles of War. *Honorable Company's* section xii. Art. v. of the Articles of War. See *Native* Articles of War.

PREVARICATION—CHARGE. "With scandalous and infamous behaviour, such as is unbecoming the character of an officer and a gentleman, in having, on the —— day of ——, grossly equivocated and prevaricated, when delivering his evidence on oath before a general court-martial, assembled at —— for the trial of —— of —— Regt."

WITNESSES. 1. Prove that he was sworn, as a witness. 2. As the mode and manner of giving his evidence is principally in point, two or more members of the court-martial before which he gave his evidence should be examined. 3. It will appear from his answers to the various questions put to him

compared altogether, how far he prevaricated or shuffled, in his evidence, with a view to avoid giving evidence, against or in favor of the prisoner who was under trial, or, with the view of not giving evidence applicable to the case—well knowing the facts, and concealing his knowledge. 4. If his evidence related to matters of *opinion*, there would be greater difficulty in convicting him; but as to the knowledge of any *fact*, other witnesses may swear that he was present as well as themselves; or that he had the same means of knowing such facts.

SENTENCE. If *scandalous, &c.* Under articles 31 and 37, shall be cashiered. If acquitted of "scandalous, &c. manner," then *discretionary* under article 70, and *may* be the same sentence. *Honorable Company's* Sect. xiv. Art. xxvi. or, &c. Sect. xxi. Art. ii. of the Articles of War. See *Native* Articles of War. See G. O. C. C. 6th June, 1828 and 12th Feb. 1830, for *cases*.

PRIZE MONEY—*Clandestinely* obtaining. (G. O. C. C. 9th Oct. 1826.)

R.

RACING—Transactions regarding, (G. O. C. C. 1st April, 1837.)

RAPE—"Rape has been defined to be the having unlawful and carnal knowledge of a woman, by force and against her will." *Russell*, vol. i. p. 556). "The law presumes, that an infant, under the age of 14 years, is unable to commit the crime of rape; and, therefore, it seems that he cannot be guilty of it. This doctrine, however, proceeds upon the ground of impotency, rather than the want of discretion; and such infant may, therefore, be a principal in the second degree," (all present, aiding and assisting are, whether men or women,) "as aiding and assisting in this offence, if it appear by sufficient circumstances, that he had a mischievous discretion." In *India* it must be recollected that in *European* regiments girls are allowed to marry at 13 years of age—3 or 4 years younger than in England—and some European males under 14 years of age might commit the crime.

2. "The offence of rape may be committed, though the woman at last *yielded* to the violence, if such her consent was forced by fear of death or by duress. And it will not be any excuse that she was taken with her own consent, if she were afterwards forced against her will; nor will it be an excuse that she consented *after* the *fact*, or that she was a common strumpet, or the concubine of the ravisher: for she is still under the protection of the law, and may not be forced. Circumstances of this kind, however, though they do not necessarily prevent the offence from amounting to a rape, yet are material to be left to the jury, in favor of the party accused, especially in doubtful cases. The notion that if the woman conceived, it could not be a rape, because she must, in such case, have consented, appears to be quite exploded." (*Ibid*, p. 557.)

3. "Upon a case reserved, 4 of the judges thought that the having carnal knowledge of a woman whilst she was under the belief of its being her husband, would be a rape; but the other 8 judges thought that it would not be. But several of the 8 judges intimated that if the case should occur again, they would advise the jury to find a special verdict." (*Ibid*, p. 558.)

4. Section 66 of the Act 9 Geo. 4, c. 74, declares—"Whereas offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of these several crimes, &c.—that it shall not be necessary, &c. to prove the actual *emission* of *seed* in order to constitute a carnal knowledge; but that the carnal knowledge shall be deemed complete upon proof of *penetration* only."

5. "But a very slight penetration is sufficient. Thus, where it was proved on behalf of a prisoner, who was charged with having ravished a young girl, that the passage of her parts was so narrow that a finger could not be introduced; and that the membrane called the *hymen*, which crosses the vagina, and is an indubitable mark of virginity, was perfectly whole and unbroken; but it was admitted that the hymen is in some cases an inch and in others an inch and a half beyond the orifice of the vagina; the judge left

it to the jury to say whether any penetration was proved. And the judges afterwards held that this direction was perfectly right, and that the least degree of penetration is sufficient." *(Ibid,* p. 558.)

6. *Richeraud* (p. 437)—states that—" The relaxed state of the parts from a great quantity of mucus, in a woman subject to the fluor albus; or from the blood of the menstrual discharge, may make the *hymen* yield and not rupture, so that a woman might *seem* a *virgin* without being such; while another woman who has *not* lost her virginity might, from illness, have her hymen destroyed. There are, in the last place, persons in whom the hymen is so indistinct, that several anatomists have doubted its existence."

7. The ravished party is a competent witness; and indeed she is so much considered as a witness of necessity, that where a husband has been charged with having assisted another man in ravishing his own wife, the wife has been admitted as a witness against her husband. But though the party ravished is a *competent* witness, the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony." *(Russell, ibid,* p. 562.)

8. "*Lord Hale* says—" It is true, that a rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." And adds—" the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes, of *malicious* and false witnesses." *(Ibid,* p. 563.)

Charge. "With having at —— on — day of —— violently and feloniously made an assault upon the person of ——, (age 7, 8, 9, &c. if a child) and violently, and against her will, feloniously ravished and carnally known the said ——."

Witnesses. 1. The party ravished; other witnesses if

they were present, or near the spot at the time. 2. Prove her age. 3. If any cries were heard, as if calling for help. 4. The medical evidence as to the state of her person and private parts. 5. The condition of the clothes worn at the time. 6. If she has had any quarrel with the prisoner. 7. "If the witness" (she) "be of good fame; and if she presently discovered the offence, and made search for the offender. If the party accused fled for it." (*Blackstone*, vol. iv. p. 213). 8. The accused if discovered in the fact, was his person examined: (instances have been known of soldiers diseased, conveying the disease to children; and such forms strong proof against the accused.) 9. "The statute of Westminster 1. c. 13—makes the deflowering a child above 10 years old and under 12, though with her own *consent*, a misdemeanor punishable by 2 years' imprisonment." (*Russell*, vol. i. p. 564.)

Sentence. If the girl be *under* the age of 8 years, the sentence is death, as a felon (may be transportation for life or term of years under sections 27 and 29 of the Act). If *above* the age of 8 years—and under the age of 10 years—a *misdemeanor* and *imprisonment* (section 65, of 9 Geo. 4, c. 74.)

Assault with intent to ravish. 1. "Where there is no reason to expect that the facts and circumstances of the case, when given in evidence, will establish that the crime of rape has been completed, the proper course will be, to prefer an indictment, for an assault with intent to ravish; which offence, though only a misdemeanor, yet is one of a very aggravated nature, and has, in many instances, been visited with exemplary punishment. But this proceeding should not be adopted where there is any probability that the higher offence will be proved; as where, upon an indictment for an assault with intent to commit a rape, the prosecutrix proved a rape actually committed, a learned judge directed an acquittal, on the ground that the *misdemeanor* was merged in the felony. (*Russell*, vol. i. p. 563.)

2. It will be seen that there is great difficulty in proving a rape in the case of young children (see *Precedents* under

the head "*Children*")—so that it is better to try for the "attempt" in such cases; and on proof, the discharge of the prisoner may be effected: as it cannot be expected that a girl much under 8 years of age could prove the rape committed on her person.

CHARGE. "With having at —— on — day of —— assaulted, *(beaten, wounded and ill treated)* —— (aged — years) with intent violently and against her will, feloniously to ravish and carnally know the said ———."

WITNESSES. 1. The attempt may be partly proved by the girl and partly by other persons. There is here no proof of penetration required,—even any injury to her private parts, would be sufficient—penetration, indeed, may be impossible owing to her tender age. 2. The state of her private parts and clothes and of the prisoner's—will be important evidence.

CASES, as to *native women*, G. O. C. C. 27th Nov. 1821; 18th May, 1822; 31st Jan. 1825; 18th Aug. 1827; 11th July, 1828; and 13th Jan. 1834. A *Native* girl of 7 or 8 years, G. O. C. C. 31st Jan. 1825. *European girls*, one under 5 years, 31st (K. T. 28th) Aug. 1833. In the case of the girl under 5 years, the prisoner was acquitted of the *rape* and found guilty of the attempt. (2 years' imprisonment, and recommended by the court, at the expiration of the sentence to be *discharged* with *ignominy* from H. M.'s service."

ROBBERY—(See G. O. C. C. 20th Sept. and 28th Nov. 1827; 27th Nov. 1828; 30th April, 1830; 18th Jan. 1831; 2nd March, 1832; 8th Jan., 10th June, (K. T. 9th May,) and 7th Oct. 1833; 5th Feb., 31st (K. T. 19th) March, 1835; 11th Jan. 1836, and 15th (K. T. 13th) Feb. 1838.) See *Burglary*, and *Highway-robbery*.

S.

SODOMY—1. Sect. 63 of 9 Geo. 4, c. 74, enacts, "That every person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall

suffer death as a felon." *Russell*, vol. i. p. 567, states, that "the offence consists of a carnal knowledge committed against the order of nature by man with man; or in the same unnatural manner with women; or by man or woman in any manner with beast. With respect to the carnal knowledge necessary to constitute this offence, as it is the same that is required in the case of rape, it will be sufficient to refer to that crime."

2. *Archbold*, p. 262, states that, "1. It is not necessary to prove the offence to have been committed *against* the *con sent* of the person upon whom it was perpetrated; 2ndly. Both *agent* and *patient* (if consenting) are equally guilty. If it be committed on a *boy* under 14 years of age, it is felony in the agent only; and the same, it should seem, as to a *girl* under twelve." But section 63 of 9 Geo. 4, c. 74, specifies no age—the words are "every person," so that the age in *India*, is immaterial.

CHARGE. "With having at ———, on the ——— day of ——— feloniously made an assault on ———, and feloniously, wickedly, and against the order of nature, carnally known the said ——— and committed the detestable crime of buggery on the body of the said ——— (or *beast*).

SENTENCE. Death as a felon, under section 63 of the Act; but under sections 27 and 29, may be transportation for life or term of years. See *Precedents*—under head of *Unnatural crimes.*

STABBING—*With intent to do some grievous bodily harm.* CHARGE. "With having at ——— on ——— day of ——— 183—, feloniously and maliciously stabbed with a bayonet in the left arm, belly, and back, Peter Elliott, Drum Major, of the same Regt.; with intent in so doing, to do him, the said Peter Elliott, some grievous bodily harm."

SENTENCE. "Transportation, as a felon, for seven (7) years." (G. O. C. C. 3rd June, 1836.)

STEALING—*From a dwelling house, &c.* (G. O. C. C. 9th May, 14th May, (K. T. 21st April,) and 13th Oct. 1835; and 11th March, 1836.) See section 87 of 9 Geo. 4, c. 74.

STOLEN GOODS—*Having in possession, knowing them to be stolen.* (G. O. C. C. 5th April, 1823; 6th March, 1828; 13th Aug. 1834, and 18th (K. T. 12th) Jan. 1836), under section 107, *transportation,* as a felon, not exceeding 14 years, or, to *imprisonment* not exceeding 3 years.

SWINDLING—(G. O. C. C. 30th Dec. 1826.)

T.

THEFT—(G. O. C. C. 29th (K. T. 26th) July, 1834.)

TREASURE CHEST—Stealing from (G. O. C. C. 20th Dec. 1821; 18th June, and 2nd July, 1836).

U.

UNNATURAL CRIMES—See *Sodomy.*

W.

WOUNDING—1. *With intent to do some grievous bodily harm.*" CHARGE. "With having at ——— on the ——— day of ——— violently, maliciously and feloniously assaulted, and severely wounded, with a sword, or other sharp instrument, ———; with intent to do him, the said ———, some grievous bodily harm."

SENTENCE. Under section 60 of 9 Geo. 4, c. 74—Death as a felon. But, under sections 27 and 29 of the Act, may be transportation for life, or term of years.

2. *Wounding with intent to murder,* (section 59 of the Act.) —G. O. C. C. 15th April, and 22nd Sept. 1828; 15th Oct. 1829; 5th May, 1831, and 24th Feb. 1836. *Other cases of wounding,* (G. O. C. C. 19th Aug. 1829; 29th Oct. and 3rd Nov. 1830; 19th Jan., 16th April, and 31st Aug. 1831; 15th Oct. 1832; 11th and 22nd July, 1833; 18th Sept. 1834; 16th (K. T. 14th) May, 1836; 20th July, 1837, and 15th Jan. 1838.)

CHAPTER IV.

REGIMENTAL COURT MARTIAL.

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1. HEADING. Proceedings of a (*European* or *Native*) Regimental court-martial held at —— by order of —— commanding —— regiment, for the trial of ——, and such other prisoners as shall be duly brought before it, and appointing the following officers to compose the court.

2. *President.*

Capt. A——.

Members.

Lieut. B ——. Lieut. C ——.
Ensign D ——. Ensign E ——.

Interpreter, Lieut. F ——, if a native court or if there are native witnesses.

G ——, Superintending officer, or prosecutor.

N. B.—5 or 3 officers may form the court, if 5 are not conveniently to be had. If a *Native* court, subadars or jemadars are president and members.

If the regular interpreter is sick any other officer may be appointed; and in failure of any interpreter any officer of the court, being sworn as interpreter, may interpret to the court.

A copy of the charge should be given to the prisoner a proper time before the trial (at least 24 hours), and the interpreter should give a translation to him, and explain it to him.

It is directed that at *Native* courts the names of the officers to compose the court shall be made known to the prisoner, that if he has any proper objection it may be urged by him before the court is sworn. Prisoners are never asked

at Regimental courts-martial if they have any objection to any of the members.

3. Place of Assembly. *Dinapoor.* Monday —— day of —— 183–. The court met this day at 6 a. m. *(or other hour)* at the regimental mess room. President, members and interpreter, all present.

4. Mode of Sitting. The president takes his seat, and the members right and left of him, according to seniority.

5. Prisoner brought into Court. The prisoner —— of —— company of —— Regt. is brought into court, called by name, and placed opposite to the president. If he has been hand-cuffed, he cannot legally demand to have them taken off till he has pleaded. And, then, if there be any fear of rescue, or escape, they may be kept on, and indeed, if he strikes one of the sentries in court *(there are usually two)* the hand-cuffs may be kept on.

6. Order for assembly read. Read the regimental order directing the assembly of the court, and appointing such and such officers president and members, *(the order not to be inserted.)*

7. Court sworn. The president swears the members *(and may be altogether)*, after which one of the members swears the president. The *interpreter* is sworn by the president when required. At *Native* courts-martial, the superintending officer swears the interpreter, who, then, swears in the president, and afterwards the members. After which the interpreter swears the superintending officer.

8. Charges—*(when read before arraignment).* The court may before the arraignment of the prisoner, read the charges and clear the court, if there be any doubt; and might if there should be any real defect in them, adjourn the court; as after the prisoner's plea *(arraignment)* they cannot be altered. However this should not be done on slight grounds.

9. *If the charges are very defective.* Adjourn the court and report through the Adjutant, to the Comg. officer, and record "the court having great doubt regarding the wording, &c. of the charges, adjourn at —— a. m. *sine die*, and

report the same for the information of the Comg. officer." Prisoner remanded.

10. Re-assembly. The court reassembles agreeable to regimental orders of —— date at ——— at 6 a. m. President and members, &c. all present.

11. Prisoner brought into Court. The prisoner is brought into court.

12. Letter read. The president reads a letter from the Adjutant by order of the Comg. officer, pointing out that the court are mistaken as to the defect in the charges and directs them to proceed with the trial. *(G. O. C. C. 6th June,* 1821.) *(Letter recorded).*

13. Charges read to prisoner. The charges *(or modified charges, the prisoner having a copy)* are read to the prisoner, and entered as follows.

14. Plea. Qn.—*By president to prisoner. Private* ———, &c. Are you guilty, or not guilty?

A.—Not guilty. If he pleads guilty one or more witnesses are directed to be examined—to enable the Comg. officer to judge of the merits of the case, as to remitting part, &c. of sentence.

Or,—The prisoner may plead guilty to part of the charge, and not guilty to the rest.

15. Witnesses. Withdraw, all but the one to be examined.

16. Prosecutor. The Adjutant or Captain of the company *(must be a military person)*, or Qr. Master, &c. makes a short introductory statement if necessary which is seldom the case. If he has any evidence to give he should be examined as 1st witness.

Prosecutor. —— Sworn, &c. examined as a witness for the prosecution. *(To record as below* in the margin at each page throughout the proceedings, 1st, 2nd, witness, &c.)*

17. Charges not read. It is not usual to read the charges except in very ordinary cases; as it instructs the witness what evidence to give.

* 1st Witness prosecution.

Qn. *To prosecutor* by *president*.—"What do you know regarding the prisoner's conduct on the 15th instant?"

A. I was present on the 15th inst. when the prisoner said he would have justice, and went up to, and struck, Serjt. ———, then in the execution of his duty, as orderly Serjt.; and the prisoner, also, said, while I was examining into the conduct of some other men, that I favored the N. C. O.

Qn.—Was the prisoner drunk?

A.—No, he was not. He had, I heard, been drinking, but was then perfectly sober; Serjt. ——— told me that more than 24 hours had elapsed since he was brought to the barrack guard.

Cross-examined by prisoner. Qn.—Did not Serjt. ——— give me abuse, and call me names?

A.—No, he did not.

Prosecutor remains in court, and calls Serjt. ———.

Serjt. ———* called, sworn, and examined by prosecutor.

Qn.—State what was the prisoner's conduct on the 15th instant?

A.—He said I was not fit to be a N. C. O. and came up to me and struck me.

Qn.—Who were present when this occurred?

A.—Serjt. ——— and Corporal ———.

Qn.—Was the prisoner drunk or sober?

A.—Quite sober, I put him through his facings—and he did them correctly, and I saw him walk steadily. (*Call Serjt.* ——— and *Corporal* ——— *if required.*)

18. THE PRISONER TAKEN ILL. The prisoner being taken ill, the court adjourn at ——— P. M. till to-morrow at 6 A. M.

2ND DAY'S PROCEEDINGS.

19. Tuesday ——— day of ———. The court reassembled this day at the mess room agreeably to adjournment of yesterday. President and members all present.

The Adjutant forwards a medical certificate signed by Dr ——— stating the prisoner's inability to attend the court,

* 2nd Witness prosecution.

owing to sickness; but shall report when he will be able to attend. The court adjourn at — o'clock till the prisoner shall be reported well enough to attend.

3RD DAY'S PROCEEDINGS.

20. REASSEMBLY. Wednesday —— day of ———, 183-. The court reassembled this day at the mess-room by order of the president. President and members all present.

Read report of Dr. ——* certifying the prisoner's being well enough to attend the court. The prisoner is brought into court.

The *prosecutor* ——— appears in court.

21. PRISONER ILL. The prisoner being weak from the effects of illness, requests leave to have a chair.

The court order a chair for the prisoner.

22. PROSECUTION CLOSED. The prosecutor declares the prosecution to be closed.

23. *The president* (or superintending officer) to prisoner.

Qn.—Private ———, what have you to say in your defence?

A.—I beg to give in this paper as my written defence—and that it may be read by the president, or any member of the court.

24. DEFENCE. Read by the president. (If at a *Native* court, the interpreter reads it *(translation)*. Sometimes a prisoner asks for a day to prepare his defence—but this is seldom the case at inferior courts-martial. Sometimes it is written for him in court—or he makes *(most usual)* a verbal defence, and throws himself upon the mercy of the court.

25. WITNESSES—*Character*. Have you any witnesses whom you wish to call?

A.—None, but as to character, I beg leave to call on Lieut. ———, member of the court for a character.

Lieut. ———*, leaves his seat, and is sworn as a witness by the president.

Qn.—*By prisoner*. Have the goodness to state your opinion of my general character.

* 1st Witness defence.

A.—You belong to my company; since I have known you, now 5 years, I have never known you to be insolent before, or to use violence to any N. C. O., or use intemperate language. Witness resumes his seat as member.

26. Defaulter's Book. The prisoner requests that the regimental general Defaulter's Book may be produced. The Adjutant is sent for to bring it.

Lieut. ———,* Adjt. —— Regt. sworn and states that the book which he now produces is the regimental general defaulter's book.

The president desires the Adjutant to point out the prisoner's company and name.

The president refers thereto—and finds that the prisoner has not before been tried by any court-martial; and that there is nothing particular recorded against his name—*(record these facts)*.

Qn.—By prisoner to Adjt. ——. How long have I been in the regiment?

A.—12 or 13 years.

27. Defence closed. The prisoner having nothing more to offer, closes his defence.

28. Court cleared to deliberate. The court is cleared to deliberate.

29. Prisoner remanded. The prisoner is ordered to be taken to the guard.

Proceedings read over if required.

30. Finding. The court are of opinion that the prisoner ——— No. —— of —— (or Capt. ———'s company, —— Regt. is guilty of the charge exhibited against him.

31. Sentence. The court sentence the prisoner, —— No. —— of —— (or Capt. ———'s) company, —— Regt. to suffer —— imprisonment (or solitary imprisonment) for —— days, in such place as the Comg. officer may be pleased to direct. *(Signed)* ——— President. Taken *(or sent)* sealed to the Comg. officer, as the Regtl. rule may be.

Consult the preceding chapter, under the head of "*Charges, &c.*" and the Articles of War.

32. Corporal punishment. H. M.'s Service—G. O.

* 2nd Witness defence.

H. G. 24th August, 1833, in cases of—1. Mutiny, insubordination, and violence, or using or offering violence to superior officers. 2. Drunkenness on duty. 3. Sale of, or making away with arms, ammunition, accoutrements, or necessaries, stealing from comrades, or other disgraceful conduct (to restrain it in the above cases as much as possible, with safety to the discipline of the army), not above 100 *lashes* by a *regimental* court-martial. Imprisonment for 30 days, solitary imprisonment 20 days.

33. Honorable Company's Army. Not laid down as to amount of corporal punishment *(should be as above)*. Imprisonment 6 weeks, solitary or otherwise.

34. Native soldiers. Under G. O. G. G. of I. in C. No. 50 of 1835—24th Feb. 1835, corporal punishment prohibited—and *dismissal* in cases of "stealing—marauding—violence on a march—gross insubordination—serious offences against discipline—or actions of a disgraceful and infamous nature, unbecoming the character of a soldier."

N. B.—Under circular A. G. O. 20th Oct. 1837, corporal punishment not awardable to drummers or musicians in the *Native* army—*(by G. G. of India in Council.)*

35. Adjournment. The court close their proceedings at —— o'clock and adjourn *sine die* (or having closed, &c. proceed to the trial of ———).

N. B.—The pages are directed to be numbered. There should be no erasures or interlineations.

36. Revision. The court reassemble at the mess-room this —— day of —— 183—, agreeably to regimental orders of —— date, to revise their finding and sentence.

President and members all present.—Read and enter a letter from the Adjt. by order of the Comg. officer, pointing out an error—no new evidence.

37. Revised finding. The court having reconsidered the evidence, find ——— (or adhere to their former finding.)

38. Revised sentence. The court sentence the prisoner, No. —— of —— (or Capt. ———'s) company —— Regt. to ——. Confirmed. (Signed) ——— Comg. — regiment.

N. B.—To leave a space between sentence and adjournment for Comg. officer's confirmation, &c.

39. Adjournment. The court adjourn at —— o'clock, *sine die.*

(Signed) ———— Captain,
—— *Regt. President.*

N. B.—By circular H. G. 24th June, 1830, it is directed that a medical officer should certify whether the prisoner is capable of undergoing corporal or other punishment. It may be as follows:—

"I hereby certify that I have examined ———, and find that he is in a good state of health, and capable of undergoing corporal punishment, or imprisonment, solitary or otherwise, (and with or without hard labor.") The words in brackets are intended for the *home* service. *Native soldiers*, if sentenced to *dismissal* from the service, the proceedings are to be sent to the general, &c. officer Comg. the division with a *descriptive* roll; and the Comg. officer should *approve*, &c. of the proceedings, and recommend, &c. the execution of the sentence, or he may remit the sentence. If sentenced to be deprived of the extra rupee per mensem for length of service, the proceedings must (*G. O. C. C.* 11*th July*, 1837) be sent to the Adjutant General of the army for the Commander-in-chief's confirmation. A *descriptive roll* to be sent.

See G. O. C. C. 5th May, and G. G. of India in Council, 17th April, 1837.

Numbering. The proceedings beginning 1st Jan. and ending 31st Dec. of each year, are ordered to be numbered 1, 2, 3, &c.

Registry. To be sent after execution of sentence to D. J. A. G. for registry, if in the Honorable Company's service.

Hours of sitting. In *India* from 6 a. m to 4 p. m. (in England, 8 a. m. to 4 p. m.) The same as to *Native* troops. (Lr. No. 516, J. A. G. 5th Oct. 1835.) Where an immediate example is to be made, may sit at any hour *day*, or, *night.*

Corroboration. It should not be recorded—"Witness corroborates the former witness's evidence."

District or Garrison Courts-martial.

1. Proceedings of a district *(or garrison)* court-martial, assembled at ———, on the —— day of —— 183–, by order of Major General *(or other officer not under the rank of Lieut. Colonel)* ———, commanding the —— division *(district or garrison)*—for the trial of ———, and of such other prisoners as shall be duly brought before it.

2. *President* —— of —— Regt.

(never under the rank of Captain.)

Members.

Capt. —— of —— Regt. Capt. —— of —— Regt.
Lieut. —— of —— Regt. Lieut. —— of —— Regt.
Ensign —— of —— Regt. Ensign —— of —— Regt.

N. B.—Or in single column. See *Genl.* court-martial.

The court may be entirely composed of the officers of the prisoner's Regt.—or partly of officers from other Regts.—In England and on the home service, staff officers *(except A. D. C.)* are eligible to be members, &c. of these courts. The president must not be the Comg. officer of the prisoner's Regt.—nor Governor of the garrison, &c.

3. Interpreter. If required.

4. Place of assembly. Dinapoor, Monday —— day of —— 183–. The court met this day at the mess-room, &c. of — Regt. at —— A. M. agreeably to division, &c. orders. President and members all present.

5. Prisoner brought into Court. The prisoner *(number* and company, &c.) is brought into court—see as to *Irons,* &c. *Regtl.* court-martial, No. 5.

6. Orders for assembly read. Read the division and station orders directing the formation and assembly of the court.

7. Challenges. The names of the officers composing the court, are read over by the president to the prisoner.

Qn.—By president. Private ——, have you any objection to any of the officers composing this court?

A.—None. (If he has any, he must give his reasons)—the court is cleared, to decide, and the member withdraws till

it is decided whether he shall sit or not. If the president be objected to, the objection must be recorded, and reported to the A. or D. A. G. &c. for the information of the general officer, &c., and the court adjourns. If one of the members be challenged the same must be done *(if only 7 officers)* as it is not usual to name more than 7 officers in orders.

N. B.—As to *Previous Convictions*, see No. 23.

8. Court Sworn. The president swears in the members, and one of them afterwards swears in the president.

9. Charges read and entered. The charges are read and entered, as follows:—(If *defective*, see *Regtl.* court-martial, No. 9.)

10. Plea. *Qn. by president to prisoner.* Are you guilty, or not guilty? *(See Regtl. court-martial, No.* 14.)

A.——

11. Witnesses withdraw, except the one under examination.

12.—Prosecutor. (The Captain of the company, &c. or Adjutant) see *Regtl.* court-martial, No. 16. If he has any statement he makes it, and it is recorded; and then examines his witnesses.

13. 1st Witness for Prosecution. Private ——* No. — of — Compy. — Regt. called, sworn (by President) and examined by Prosecutor—(not usual to read the charge.)

Qn.—By prosecutor.—State what you know regarding the prisoner's conduct on the night of ———.

A. ——

Cross-examined by prisoner, Qn. ——

A. ——

Re-examined by Prosecutor, Qn. ——

A. ——

By Court, Qn.——

A. ——

And so on with the other witnesses.

14. Prosecution closed. The prosecutor here closes the prosecution.

* 1st Witness prosecution.

15. Adjournment. It being 4 o'clock p. m. the court adjourn till to-morrow morning at —— o'clock.

Prisoner remanded to confinement.

2nd Day's Proceedings.

Dinapoor, mess-room —— Regt. Tuesday — day of —— 183–; the court reassembled at —— a. m.—pursuant to adjournment of yesterday.

President and members all present.

The prisoner Private —— is brought into court.

16. Defence. The prisoner is called upon for his defence—read and entered—(read by president, &c. See *Regtl.* court-martial, No. 24.)

17. *1st Witness for defence**.

18. Character of Prisoner. See Nos. 25 and 26 *Regtl.* court-martial.

19. Defence closed. Recorded—the prisoner having nothing more to offer, closes his defence.

20. Court cleared to deliberate. The court is cleared to deliberate. (If any previous convictions the prisoner not to be taken away to the guard-room—but kept out of hearing, and the Adjt. should be warned.)

21. Finding. The court are of opinion, that the prisoner Private ——, No. — of No. —, (or Capt. ——'s) company, —— Regt., is guilty of the charge exhibited against.

22. Court re-opened. The court is re-opened—the prisoner is again brought into court. The prosecutor appears in court.

23. Previous Convictions. If the prosecutor desires it and there are any *previous convictions,* he intimates the same to the court, for (see *Precedents* under *convictions)* it does not rest with the court.

It appears under circular War Office, 24th March, 1830, that the president is, *before the court is sworn,* to ascertain if notice of such intention has been given to the prisoner. A Field officer suggests that the question to be put, be as

* 1st Witness defence.

follows—"*Has the prisoner received all the usual notices required by the Regulations?*" The object is to conceal the fact from the court's knowledge till found guilty.

24. Adjt. Sworn. Lieut. —— Adjt. H. M.'s — Regiment called, sworn (by president) and examined by prosecutor.

Qn.—To Adjt.—Has the prisoner received due notice that a former conviction (or *convictions*) would be given in evidence against him?

A.—Yes, I gave him notice myself.

Qn.—Produce the former convictions.

A.—Here they are. (*Prosecutor* refers to court-martial book, &c.)

Record of Previous Convictions. Private —— No. — of No. — company — Regt.

1*st Conviction.* Tried, at ——— on — day of —— 183–, for theft, and sentenced to 100 lashes by a Regtl. court-martial. Confirmed—50 lashes inflicted, the remainder remitted.

2*nd Conviction*—the same.

26. General Character *of Prisoner.* (Either the prosecutor or court, can call upon the Adjt., Capt. of prisoner's company, &c. for a character—supposing the prisoner had not done so—or for witnesses, if the prisoner has only produced the Defaulter's Book, which contains offences punished by the commanding officer; but though it (Regtl. Genl. Defaulter's Book) may not contain his name, still the conduct of the prisoner may have been lately bad, and the same may be inquired into, to—"mete out punishment." See *Convictions* under *Precedents*.

27. Sentence. The court, taking into consideration two (2) previous convictions, *(and the prisoner's general bad character)* sentence the prisoner, Private ——— No. — of No. —, (or Capt. ———'s) company, —— Regt., to suffer imprisonment for four (4) months, in such place as the Major General, &c. commanding the division may be pleased to direct.

N. B.—Agreeably to Circular H. G. 16th December, 1837, *Solitary* imprisonment can only be awarded for *one* month.

(Signed) ——— Major,

—— Regt. President.

Confirmed.

(Signed) ——— Major General,

Dinapoor, 1st Sept. 1838. Comg. Dinapoor division.

28. RECOMMENDATION TO MERCY. *(If so leave space between it and sentence, for confirmation and signature of Commanding officer)*.

(6 Officers recommend the Prisoner to mercy.)

(Signed) ——— Major,

—— Regt. President.

29. RECOMMENDED TO BE DISCHARGED WITH IGNOMINY *(for disgraceful conduct)*. The court beg most earnestly to recommend that prisoner, owing to the infamous nature of his conduct and general bad character, may be discharged Her Majesty's service, with ignominy.

N. B.—In this case the General, &c. officer commanding the division should record "*Approved; but as the prisoner is recommended to be discharged with ignominy, the proceedings will be transmitted to Army Head Quarters.*" (In *India* there is a great objection to discharge European soldiers, as they must either roam about as vagabonds, or Government pay the expense of sending them home. I recommend that such men may be sentenced by a *Genl.* court-martial, to serve on board a man-of-war.)

30. TRANSMISSION. The proceedings are transmitted to the J. A. G. for transmission to the J. A. G. in London.

APPEAL FROM A REGIMENTAL TO A GENERAL COURT-MARTIAL.

1. Proceedings of a European general court-martial held at Dinapoor, on Monday, the 9th day of October, 1826, in pursuance of Genl. orders of the 30th Sept. 1826, and by order of Major Genl. Dick, commanding the Dinapoor division, and by virtue of a warrant from H. E. Genl. the Right Hon. Lord Combermere, G. C. B., G. C. H., Commander-in-chief in India, for the trial of all such prisoners as may be duly brought before it.

2. *President.*

Lieut. Col. Warden, 14th Regt. N. I.

Members.

Captain T. Marshall, Artillery.
——— W. Martin, 57th Regt. N. I.
——— S. Bolton, H. M.'s 31st Foot.
5. ——— Sir C. Farrington, Bart., H. M.'s 31st Foot.
——— W. Boardman, H. M.'s 31st Foot.
——— C. Shaw, H. M.'s 31st Foot.
Lieut. A. Farquharson, 6th Extra Regt. N. I.
——— A. Douglas, H. M.'s 31st Foot.
10. ——— R. Campbell, H. M.'s 31st Foot.
——— A. Speirs, 6th Extra Regt. N. I.
——— A. Grueber, H. M.'s 31st Foot.
——— J. Russell, 46th Regt. N. I.
——— W. A. Smith, 57th Regt. N. I.
15. ——— J. B. R. Oldfield, 40th Regt. N. I.

Capt. J. Steel officiating D. J. A. G. Dinapoor and Benares divisions, conducting the trial.

3. Assembly. The court having assembled in the mess house, H. M.'s 31st Regt. at 11 A. M., the president, members, and Judge Advocate all present. The Appellant and Defendant appear before the court.

4. Orders read. G. O. by the Commander-in-chief, dated 30th Sept. 1826, directing the assembly of the court, are read.

Station orders by Major Genl. Dick, commanding at Dinapoor, directing the formation and assembly of the court, are read.

5. Letter from Adjt. Genl.—A letter from the Adjt. Genl. H. M.'s Forces in India, *granting* the appeal of Private John Leeson, 31st Foot, from the decision of a *Regtl.* court-martial, is read.

6. Warrants. The warrants to the president, and Officiating D. J. A., are read—*(as a G. O. was issued the Commander-in-chief's warrant to M. G. Dick, was not required to be read.)*

7. Qn. by J. A. to Appellant—John Leeson, have you any objections to any of the officers present sitting as members of the court?

A.—None.

8. Qn. to Defendant, Capt. Byrne—Have you any objections to any of the officers present sitting as members of the court?

A.—None.

9. Oaths administered to the president, singly, and then to the members by the J. A. The president swears in the J. A.

10. Witnesses. All evidences summoned on the trial are directed to withdraw.

11. Cause of Appeal. The Appellant before the court, Private John Leeson, H. M.'s 31st Foot, appeals from the decision of a *Regtl.* court-martial held by order of Lieut. Col. James Cassidy, commanding 31st Foot, at Dinapoor, the 7th day of August, 1826.

12. *President.*

Captain T. Skinner.

Lieut. Asteir,	Members	Lieut. Hayman,
—— Ward,		Ensign Wellenhal.

13. Opinion of the Regtl. Court-Martial. 1. "The court having patiently investigated the complaints made by Private John Leeson against Capt. Byrne, is of opinion with regard to the *first*—viz. that his objection to sign his accounts for the month of June in consequence of an overcharge of one anna for a pair of *boots*, is perfectly

groundless. The entries in both *day-book* and *ledger* of the company were exceedingly clear, and not the least appearance of an erasure in either."

2. "With regard to the *2nd Complaint*, an overcharge of one anna for *washing*; the court is of opinion that it also is groundless."

3. "With regard to the *3rd Complaint*, his claim to being credited for any *tea* and *sugar* that might have remained unconsumed after the arrival at Dinapoor; the court is of opinion it is perfectly groundless."

"It appears to the court that every opportunity to adjust his accounts has been given to the complainant, and every examination into his objections and explanations seems also to have been afforded."

"The charge for *tea* and *sugar* on the river, was the same throughout the Regt., and could not have been supplied at a more reasonable rate; and the court does not consider that any that remained, could have been due to the men."

(Signed) THOMAS SKINNER, Capt.
31st Regt. and President.

I approve.

(Signed) JAMES CASSIDY, Lieut. Col.
Comg. 31st Foot.

14. *Lieut. Col. J. Cassidy**, commanding the 31st Foot. called in to court and sworn.

QN. by J. A.—"Are these the *original* proceedings of the *Regtl.* court-martial from which John Leeson appeals; and does it bear your confirmation as such?"

A.—"Yes."—Retires.

15. APPELLANT. Qn. by J. A.—"John Leeson, are you the person who appeals from the sentence of the Regtl. court-martial?"

A.—"Yes, Sir."

16. APPELLANT. Addresses court. "The ground of my appeal is that Capt. Skinner the president of the court told me that the question I put, &c.

* 1st Witness.

17. Regtl. Court-Martial. "The proceedings of the Regtl. court-martial are read."

18. Appellant.* "Addresses the court. I object that Capt. S. was president of the court-martial after having been member of a *Court of Inquiry* on the same subject. I object to that part of the evidence of Serjt. P. K.'s, &c."

19. Capt. Skinner*, H. M.'s 31st Foot, sworn.

Qn. by J. A.—"Were you the president of the Regtl. court-martial against the decision of which the Appellant, John Leeson, appeals?"

A.—"Yes."

Qn. by J. A.—"Were you member of any Court of Inquiry that investigated the same subject?"

A.—"I was member of a *half-yearly Board* of *Claims*, before which the subject came; it was decided, afterwards, that the court was not competent."

Qn. by J. A.—"Were any objections stated by the Appellant at the *time* of the sitting of the Regtl. court, to your being a part of it, in consequence of your having been on the Board of Claims?"

A.—"None."

Qn.—"Did you object to any questions put by the Appellant on that trial?"

A.—"I did not decidedly object to any,—I recommended, &c."

Qn.—"Did the Appellant acquiesce in your objection or did he evince any wish to persist in the question as material to his complaint?"

A.—"I don't remember that he did."

Qn.—"Had he done so, &c."

A.—"—— otherwise I would have cleared the court."

Qn. by Appellant (to witness).—"Did I not say, &c."

A.—"Yes, I think he did, &c."

Evidence read over, and *retires*.

20. Member of Regtl. Court. "Lieut. H. Asteir†, 31st Foot, a member of the Regtl. court-martial, sworn."

Qn. by J. A.—"Were you a member, &c."

* 2nd Witness. † 3rd Witness.

A.—"Yes." *(Examined.)*

Appellant no questions to put.—*Retires.*

21. COURT CLEARED. "Court cleared."

"Court opened."

22. APPELLANT'S ADDRESS TO THE COURT. "Mr. President and gentlemen of this Honorable court"—*(statement of grievances)*. *N. B.*—Should have been signed by Appellant.

23. APPELLANT SWORN. "The Appellant, John Leeson*, being sworn, swears to the truth of the facts contained in his address, as marked with *inverted commas.*"

N. B.—Should not have been sworn†.

* 1st Witness Appeal.

† NOTE.—I am of opinion that the Appellant should not have been sworn. It is recorded, p. 14 of the trial, 1. That "the APPELLANT, John Leeson, being duly sworn, swears to the truth of the facts contained in his address as marked with '*inverted Commas.*'

2. *Qn. by Deft.*—"When you complained to me the first time, that the Serjt. had charged the men 10 annas for *washing*, and had only paid the washermen 9 annas, did I not inquire into that complaint with the greatest patience?"

A.—"He did."

3. *Qn. by Deft.*—"When you complained to me that you had been overcharged, 2d for a pair of *boots*, did you not refer me to a man who was sick in hospital?"

A.—"Yes."

Qn. by Deft.—"Did I not after that man came out of hospital, inquire into the particulars?"

A.—"Yes."

4. *Qn. by Deft.*—"Did you sign your accounts with me up to the 24th May, after your arrival at Dinapoor?"

A.—"Yes, I did."

Qn. by Deft.—"Did you at that settlement say any thing about the *tea* and *sugar*?"

A.—"No, Sir," *(and other previous questions.)*

5. *Qn. by Court.*—"Why did you not make your complaint about the *tea* and *sugar* on signing your accounts the 24th May, the regiment having arrived at Dinapoor on the 2nd of that month?"

A.—"I always sign with the pay Serjt. first, and he told me the books were not made up. I then knew it was no use saying any thing—to the Captain I mean—regarding the *tea* and *sugar*," (and other questions.)

24. Qn. by *Defendant*—Capt. Byrne to *Appellant,* (as to the complaints.)

A.——

25. Qn. by *court,* to Appellant.

A.——

26. Adjournment. "It being past 3 o'clock the court adjourn till to-morrow at 10 A. M."

6. Page 38 of the trial, *Complainant* having closed his complaint, then:—

7., Defendant sworn.

Qn. by Appellant.—"Can you state if the *messing* for the 87th Regt. was the same as that for the 31st Regt.?"

A.—"I can state from the small account book of a man of the 87th Regt. which I have in my possession now, that it is greater than that of the 31st." *(Questions as to arrangements in the other companies—washing, &c.)*

Page 40. Begins the *Deft.'s* case.

Objections. 1. The 91st Article of War declares that "All persons who give evidence before any court-martial are to be examined upon oath, &c." But the *Complainant* ought *not* to have given evidence. The 121st Article of War declares that, "If any N. C. O. or private soldier shall think himself wronged by his Captain, or other officer Comg. the troop or company to which he belongs, he is to complain thereof to the Comg. officer of the Regt., who is hereby required to summon a *regimental* court-martial, for the doing justice to the soldier complaining, &c."

2. The complainant makes a statement in writing, and it is to be proved by witnesses. If there were no witnesses would the complainant's oath decide the case? Certainly not. As there is no legal right to swear him to the truth of his complaint or address to the court, he could not have been tried for *perjury.* The court, in this case, decided against him, and what must be the inference?

3. His evidence on oath could have no weight, because, he could only know of the overcharges—comparing his charges with those of other men—or by proving a *general* overcharge in the Regt.—this depended, as it turned out, on the evidence of others.

4. The *confession,* even, of a prisoner made on oath, cannot be received. *Russell* (vol. ii. p 650), states—"But the account given by a prisoner before a magistrate ought not to be upon oath; and if the prisoner has been sworn, his statement cannot be received. And when the examination of a prisoner before the magistrate previous to his committal, *purported* to have been taken on oath, *Mr. Jus. LeBlanc* refused to admit evidence to show, that in fact the examination was not on oath."

Prisoner. I object to Captain C. and to Lieuts. I. and J., because they were on the court of inquiry held to inquire into the crime for which I am to be tried.

J. A. to prisoner. I have the court of inquiry before me. I find that no opinion was given by the court. The objection is held to be valid if an *opinion* has been given, and this upon the principle that jurors on the petty jury cannot be jurors on the jury to try the prisoner. But where *no opinion* has been given there is no legal objection; unless, independent of being on the court of inquiry, such members of the court of inquiry can be *proved* to have expressed themselves strongly against you.

Prisoner. I will waive my objections.

N. B. If any member is objected to, he leaves the court till the court decide whether he is to sit, or not.

9. Court sworn. 1. The president is sworn by the J. A.

2. The members are sworn, *(may be all at once.)*

3. The J. A. sworn by the president.

N. B. All the members may be sworn at once. Members may be sworn according to the forms of their respective religions. (*Sections* 37 *and* 126 *of* 9 *Geo. iv. c.* 74.)

10. Jurisdiction, &c. There is no doubt that it is competent to the court *before* or *after* being sworn, to pause to ascertain if there is any legal objection to their proceeding to the trial, or if the charges require dates, or if there should be some glaring defects in them. The words of the oath "*and determine according to the evidence in the matter now before you,*" relate to the charge; so that the being sworn is not essentially necessary to enable the court to do certain acts before the arraignment; for if so, how could they decide upon challenges!

11. Prosecutor, *(if J. A. is not.)* The prosecutor may make a statement, which he should do before he is sworn, for his object is to inform the court.

12. Prosecutor's statement. 1. The prosecutor's statement may be made evidence, by such parts as he can swear to being scored under *(in italics) if with the prisoner's consent,*—thus:

"I heard a report that the prisoner had discharged his loaded musket in the barracks; *I went there and found him sitting on his cot; he abused me immediately and said 'Had you been here in time, you should have had the contents of this musket lodged in your body.'* I heard many men speaking on the subject; there was a court of inquiry held, next morning."

2. The words in *Italics* are evidence, as the prosecutor heard the prisoner utter them and as in the case of *Sir J. Murray,* (p. 194 of trial) "*entered as his evidence, separately upon the proceedings.*" But the better course would be to read the *statement,* and not to enter as such the parts to be evidence, in the fair copy; entering the parts as evidence from the statement.

Qn. by J. A. to prisoner.—Have you any objection to admit as evidence these parts (*scored* under) in this statement made by the prosecutor, or not?

A.—I have not, (or *I have.*)

J. A. Swears the prosecutor. *Qn.*—You swear to the truth of the parts in your statement *scored under,* as your evidence?

A.—I do.

The prisoner may cross-examine on this.

13. Mode of Proceeding. The prosecutor states to the court, that as there are 2 charges against the prisoner, not relating to the same facts, he proposes to produce evidence on each charge separately—(record—*court* agree or not.)

14. Contempt of Court. See *Precedents* under *Contempts, Irons,* &c.

15. Serjt. A——, No. — of No. — Co., H. M.'s — Regt., called, sworn, and examined by prosecutor. (*Charges should not be read.*)

Qn.—State what you know regarding the prisoner's conduct in barracks on ——— day of ——?

A. — I was sitting on my cot, and I saw the prisoner go to the arms'-rack, and take down his musket; my attention was called towards the prisoner's cot, by hearing Serjt. B—— call out. The prisoner struck Serjt. C—— in the face.

16. CROSS-EXAMINED *by prisoner.* Qn.—Did Serjt. B. call to you, or was he not speaking about what another man was doing?

A.—I really can't say.

17. QN. BY COURT ———

A. ——

18. SERJT. C ——— &c. sworn.

Qn. by prosecutor.—State what took place between you and the prisoner, in barracks, on the —— day of ———.

A.—About 3 o'clock in the afternoon, the prisoner struck me in the face, without any provocation, &c.

Qn.—Was the prisoner fit for duty at the time?

A.—He was; he was quite sober.

19. CROSS-EXAMINED BY PRISONER. Qn.—Had you not falsely reported me to the Serjt. Major?

A.—No,—I had not reported you to any one.

20. RE-EXAMINED BY PROSECUTOR. Had any one reported the prisoner, and who was it?

A.—Yes, it was Serjt. D———.

21. QN. BY COURT ———

The prisoner objects to the question, as not arising out of the evidence given by the witness, who has not alluded to the subject.

22. DISCUSSION *(objections).* The president, "If there is any discussion among the members, the court must be cleared.

J. A. 1. If any objection is made by a prisoner, either his words should be recorded, or he should state them in writing.

2. In the present case, it is to be observed that the rules which bind a prosecutor restricting him to cross, or re-examine, *(as the case may be,)* do not apply to the court, they may put *any* questions which appear necessary to elicit the truth, or to satisfy their minds.

23. AMICUS CURIÆ. The prisoner begs the court to allow him to have a friend to assist him in court.

The *president* says the court will allow him to have any one.

24. *Adjournment* for a short time and J. A. writes a letter to Adjt. —— to request the commanding officer will allow Private —— to assist the prisoner, (prisoner taken out of court.)

25. RE-ASSEMBLY. President and members and J. A. resume their seats.

The prisoner is brought into court. Private ——, &c. appears in court as the prisoner's friend.

26. PROSECUTION *on first charge closed.* The prosecutor declares the prosecution on first charge to be closed.

27. 2ND CHARGE. The same course as above.

28. PROSECUTION CLOSED. The prosecutor concludes the evidence on the 2nd charge, and closes the prosecution.

29. DEFENCE. The prisoner is called upon for his defence. He requests two days to prepare it.

The court allow the prisoner till —— morning at —— A. M.

30. ADDITIONAL CHARGES. The J. A. receives from the A. A. G., a copy of additional charges against the prisoner.

The court is cleared.

31. A MEMBER *doubting* if additional charges can be received after arraignment, *Court* ask for *J. Advocate's* opinion.

J. A. I am of opinion that there is no legal objection, provided the prisoner has due notice; and time to prepare for his defence.

Court opened.

32. The prisoner brought into court.

J. A. to prisoner. *Additional* charges have been exhibited against you, and I am directed to give you a copy.

Prisoner. In that case I wish to postpone my defence, and hear the evidence on the *additional* charges.

COURT. Most certainly. We will meet to-morrow (or the day after to-morrow), on the new charge. You can then apply for time to prepare your defence, if more be required.

33. ADJOURNMENT. The court adjourn at —— P. M. till —— at 10 A. M. Prisoner remanded to confinement.

2ND DAY'S PROCEEDINGS.

34. RE-ASSEMBLY. Dinapoor, Main-guard, —— day of —— 183–. The court met this day at —— A. M., pursuant to adjournment of ——.

President, and Members, all present.

A medical certificate reporting the illness of the prosecutor is read to court.

35. PROSECUTOR SICK. *Court*—Can we proceed without the prosecutor?

J. A. Certainly. The J. A. is always understood to be a joint prosecutor, and has frequently under the like circumstances, carried on the prosecution. Another prosecutor might be appointed, but there is only an additional charge which will soon be disposed of.

36. PRISONER is brought into court.

J. A. The court will now proceed to take evidence on the additional charge.

37. INTERPRETER. Lieut. —— of — Regt. Interpreter, sworn.

38. NATIVE WITNESS. Ram Sing, sepoy —— Co. — Regt., called, sworn, and examined by J. A. *(Charge not read.)*

Qn.—State what occurred on the —— day of ——?

A. ——

39. A MEMBER. Doubts whether the interpreter has correctly given the witness's evidence.

J. A. It will be as well that the interpreter should take down the words of the witness in the Native language. *(Roman characters)*. If the court have then any doubt, the particular phrase can be recorded in both languages, and the Commander-in-Chief will, thus, be able to ascertain how far the words are fairly interpreted.

Another member. I think, Mr. President, the court had better be cleared. (Court cleared.)

40. COURT CLEARED. Qn. by a member to J. A.—Can a member point out any incorrect interpretation of Native evidence?

J. A. Undoubtedly; but, there being an interpreter it

is usual to take his version of the witness's words. In some cases the court might request *(reporting it)* to have another interpreter; and, in extreme cases, any juror or member is competent, and if, sworn as interpreter, may interpret. (*State trials*, vol. 14. p. 580.) I do not think the variance, in this case, is important; and the prisoner will have the benefit of any error, or doubt. *(Court concur with J. A.)*

41. Court opened and prisoner brought in.

42. Member sick. A member taken sick retires; the surgeon certifies his inability to sit as member, and not likely soon to be able to do so.

President. We can proceed without the member I suppose?

J. A. Certainly; there are still 14 remaining, and 13 officers are the legal number: the court so decide.

43. Insanity of Prisoner. A member wishes the court cleared. Court cleared.

Member. It appears to me from the appearance, manner, and language of the prisoner, that he is not in his right senses. I think we should take the sense of the court.

J. A. The court will see that they cannot in such a manner determine the question of the prisoner's being sane, or otherwise. If there be any doubt that will be best ascertained by taking the sense of the court, as to what number of the members of the court hold such doubt. *(Put to the vote.)*

J. A. I find that out of 14 there are 7 think the prisoner to be not in his right mind, and 7 that he is in his proper senses, and, that he is pretending insanity.

President. In such cases I understand I have a *casting*, or *double* vote.

J. A. Certainly not; it is not given by the M. A. and Articles of War. As it is desirable to settle the question, I recommend a reconsideration of the opinions.

A member. I will vote with the 7 who think the prisoner not in his right senses, which will make the majority, and settle the point.

J. A. I recommend the court to send for the medical

officers, the Captain of his company, the Adjt. and the commanding officer of his Regt.; and then to inquire into the state of the prisoner's mind.

The *court* agree to this proposition and direct the *J. A.* to summon the above officers.

44. Court adjourn. The court adjourn at — o'clock P. M., till to-morrow at 10 A. M.

3rd Day's Proceedings.

45. Re-assembly; *(as in No. 34.)*

46. Medical Evidence. Dr. ——, Surgeon of prisoner's Regt. — sworn. Qn. by J. A. (*prisoner in court.*)—The court having some doubts as to the state of the prisoner's mind, wish for your opinion?

A.—The prisoner has never been in hospital for any complaint which could lead me to suppose his mind to be affected, *(remains in court to observe the effect the evidence has on the prisoner's conduct in court.)*

47. Capt. —— of prisoner's company, sworn. *Qn. by J. A.*—The court having some doubts, &c.

A.—The prisoner has been in my company for 8 years, and I never knew of his mind being affected; nor did I ever hear of any misfortune likely to induce such a state of mind. He is rather given to drinking, but I have not observed him drink for many months—*retires.*

48. The Adjt. *of prisoner's Regt.*—sworn.

Qn. by J. A.—The court having, &c.

A. ———————— retires.

49. The Commanding officer, &c.—sworn.

Qn. by J. A.—The court having, &c.

A. ———————— retires.

50. Court cleared. *J. A.*—The court I suppose entertain no doubts now. If they do, other witnesses should be examined; the men of his company, and other medical evidence on the facts in evidence, &c.

President. If no doubt be entertained we will hear the prisoner's defence.

51. Court opened. Prisoner brought into court.

J. A. Are you prepared with your defence?

Prisoner. Yes; here is my written defence. I wish Private —— who is in court, may read it—*(the court assent.)*

52. *A member.* Mr. President I wish the court to be cleared. *Court cleared.*

Member. It appears to me that some parts of the prisoner's defence are very objectionable, *(parts so and so,)* I wish to take the sense of the court, as to whether they shall be allowed to remain.

J. A. There is no doubt of the court's right to interfere in a prisoner's defence, where the style is intemperate; where third persons not connected with the trial are attacked, or where *new* matter may be introduced. The court usually caution a prisoner, and recommend his expunging any objectionable matter; if after this he persists, the court are at liberty to *direct* such parts to be expunged. The court had therefore better decide whether they think such parts should be expunged and if the prisoner on being recommended to expunge such parts should object, then that they will *order* them to be expunged.—*(Court decide by vote to do so.)* Court opened.

53. PRISONER BROUGHT INTO COURT. *J. A.* to *prisoner* —I am directed by the court to inform you that parts —— and —— of your written defence are very objectionable and that they recommend you to expunge them—*(reasons given.)*

Prisoner. I will abide by the court's opinion—*(parts, &c. expunged at the recommendation of the court.)* But, though there are parts considered as *new* matter, I do not know how to bring those grievances to the notice of superior authority.

J. A. The court have met here to decide on the evidence to be given on the *charges under investigation.* If you have any witnesses to prove the facts you state, you can make your complaint in the usual manner. If you have not witnesses to prove those facts, your bare assertion cannot avail. Besides, were the court to enter upon the *new* facts, distinct from the present charges, and the evidence should prove in your favor, such a result could not affect their verdict, or plead as any excuse for your conduct as stated in the charges.

Court cleared.

54. PRESIDENT, *(regarding the opinions of any particular member.)* A member has just handed me this question : "Cannot any member insist on having his minute recorded with his name attached to it?"

J. A. It is usual for a member to sign his name in handing up any written objection to the president, that it may be known by whom it was written ; but the member will see that were his name recorded on the proceedings, he would divulge his opinion. Such paper if submitted to the court for decision, is recorded as "a member submits to the court——." The court is then cleared, and decide thereon. No member, not even the president, can enter a *protest* or minute of objection—the objection, without the assent of a majority of the court, falls to the ground.

Court opened—Prisoner brought into court.

55. CHARACTER—See *Regtl. court*, No. 25. *District* court, Nos. 18 and 26.—See *Precedents.*

56. DEFENCE CLOSED. Prisoner declares his defence closed.

57. REPLY. *(The prosecutor being in court.)* The prosecutor wishes to make a reply.

J. A. The court will see that there is no ground for any reply. The court very properly prevented the prisoner producing *new* matter in his defence *(see No. 52)*, and they have, thereby, shut out the prosecutor from a reply. If courts would always so act it would shorten the proceedings; and render the administration of justice more simple: and prevent courts from having a mass of evidence unconnected with the charges on their proceedings; and their minds from wandering from one subject to another.—See *Precedents.*

58. SUMMING UP BY J. A. *J. A.* If the court wish it, I will shortly sum up the evidence. *Court* do not wish it.

N. B. Sometimes the court adjourn for the purpose of enabling the J. A. to prepare a *summary* of the evidence.

59. COURT ADJOURN, to deliberate.

60. EVIDENCE, &c. READ OVER. The evidence, &c. are read over, or not, as the court may require.

61. Finding. The court find the prisoner Private —— No. — of No. — (or Capt. ——'s) company, — Regt. guilty of the charges exhibited against him.

62. Previous convictions. Prisoner brought into court.

See *District* court-martial, No. 23; and *Precedents.*

63. Court closed. The court is cleared to deliberate on their sentence.

64. Sentence. The court, taking into consideration four (4) previous convictions, sentence the prisoner, Private —— No. — of No. — (or Capt. ——'s) company — Regt. to ——————.

Capt. —— (Signed) A. —— Major,
D. J. A. G. —— *Regt. President.*

N. B. As to *Corporal Punishment*, see *Regtl.* court-martial, No. 32. As to *Solitary* Imprisonment, see *District* court-martial, No. 27. N. B. And Chapter 3rd, *Sentences.*

65. Recommendation—(leave a space between it and sentence).—*A member.* I wish to recommend the prisoner to mercy.

J. A. It will be right to put it to the vote.

Member. This paper contains my reasons.

President to *J. A.*—*(in H. M.'s service the president is directed to collect the votes, in India the J. A. usually does)*— Be pleased to collect the votes.

J. A. I find out of the 14 officers present that there are 6 who recommend the prisoner to mercy. I am of opinion that there should be 8 or a majority.

A member. The Articles of War require the *sentence* to be by a *majority* of voices. This case is not mentioned.

J. A. No act of any portion of the court can be binding unless it be by a majority, for, otherwise, 6 the *minority*, might act in opposition to the *majority.*

The *court* assent to this opinion.

N. B. If 8 concur, then, I recommend this mode of recording :—

The court beg leave *(reasons, &c.)* to recommend —— to mercy, &c.

Out of 14 present, 8 officers concur in the recommendation.

(Signed) ——— (Signed) A.—— Major,
D. J. A. G. —— *Regt. President.*

66. ADJOURN SINE DIE. The court adjourn at —— P. M.—*sine die.*

(Signed) ———
D. J. A. G.

N. B. It will be an advantage that the president should sign both the sentence of the proceedings in court, and, also, those of the *fair copy*, as inconvenience has been felt owing to the death of the president. See *Precedents,* under *President.*

J. A. Sends proceedings to J. A. G.

67. REVISION. The court re-assembled this day agreeably to the directions contained in the J. A. G.'s letter ——— *(to be recorded)* and agreeably to Division orders of ———.

4TH DAY'S PROCEEDINGS.

Dinapoor ———

The court re-assembled this day at —— A. M. President and members all present, except Captain ——— sick absent—*(record having received a medical certificate.)*

President. Can we proceed to a revision without the absent member?

J. A. Certainly; the legal number is 13 officers, and more are appointed to meet these cases, otherwise the court would have to adjourn constantly, or have a new member *(or members)* appointed in case of death or sickness. See *Precedents,* under *Revision.*

68. REVISED FINDING.

69. REVISED SENTENCE.

(Signed) (Signed) A. —— Major,
——— *D. J. A. G.* —— *Regt.* and *President.*

Conducting the trial.

70. ADJOURN SINE DIE. The Court adjourn *sine die,* at — o'clock.

(Signed) ———
D. J. A. G.

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